Supreme Court, U.S.
FILED

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No. 10-318

AUG 26 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Kevin H. McKenna
Petitioner – Pro-Se
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August 23, 2010

QUESTIONS PRESENTED

Should an employment **Civil Rights** plaintiff, particularly in the case of a *pro-se* plaintiff, be lawfully entitled to full *opportunity* to enter into a fair stipulation of facts and claims *prior* to a defendant's motion for summary judgment?

In other words:

Should an employment **Civil Rights** plaintiff *lawfully* be afforded a "**Right to be Heard**"?

Because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by; *foreclosing* on the Petitioner's *opportunity* to enter into any stipulation of facts and claims *prior* to the defendant's motion for summary judgment, *and* sanctioned such a departure by the lower court, the petitioner humbly requests:

Will the United States Supreme Court *please* grant the *pro se* Petitioner in this case an exercise of this Court's supervisory power?

PARTIES

The parties are, as represented by the caption to this case:

The petitioner is: Kevin H. McKenna *pro se*.

The respondent is: the Nestle Purina PetCare Co.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CONTENTS (Appendix) vi

TABLE OF AUTHORITIES vii

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

SUMMARY OF CASE 2

STATEMENT OF CASE 3

I. Procedural Background 3

II. District Court Proceedings 5

ARGUMENT 17

I. "Fraud on the Court" 17

a. Fraud on the Court – Party 18

i. "Ro[redacted]tic[1] Relationship" 18

ii. Supervisory "Hostile Environment" (Also Totality of Circumstances) 21

b. Fraud on the Court (by Omission) – Party 24

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[1] The Respondent's mischaracterization of "relationship(s)" within this case is defamatory upon McKenna. Publishing such a mischaracterization is libelous. Accordingly McKenna has REDACTED all such defamatory mischaracterizations from being published within this Petition.

TABLE OF CONTENTS
(Continued)

Page

i. Omission of Co-worker Retaliatory Harassment Claim (Also Totality of Circumstances) 24

ii. Omission of Material Facts 26

c. Fraud on the Court – lower Courts 27

i. District Court 27

ii. Circuit Court 28

1. Circuit Court Complete Disregard for "*de novo review*" (Re: McKenna's supervisor): 28

2. Circuit Court Complete Disregard for Review of McKenna's Partial MSJ: 29

II. "Totality of Circumstances" 31

III. Inadmissible Evidence 31

a. After Acquired Evidence 31

i. Nestle's *self-made* "**Catch-22**" 34

b. Nonexistent Evidence - "4 *Pornographic Pictures*" Do NOT Exist on the Record 37

IV. The "Right to be Heard" 41

c. Summary Judgment standard 41

i. The Problem: The Absence of Party Stipulation(s): 43

TABLE OF CONTENTS
(Continued)

Page

ii. The Solution: The Dlott "Standing Order", An Employment Discrimination Victim's "Right To Be Heard": 45

REASONS FOR GRANTING 46

I. Title VII Highest Priority 46

a. Critical Opportunity for Vindication of an Important Congressional Policy 46

II. The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court. Justice demands an exercise of this United States Supreme Court's supervisory power (S. Ct. R. 10(a)).....47

b. Lower Court Disregard for *McKennon*.....47

c. Lower Court Disregard for *Harris* ("Totality of Circumstances").....47

d. "Attorney Misconduct"/"Fraud on the Court" 48

i. Case in Chief.....49

ii. Related Case 49

e. Lower Court Disregard for Summary Judgment Standards.....49

CONCLUSION.....50

TABLE OF CONTENTS
(Appendix)

Page

District Court Opinion and Order.....1

Circuit Court Order 28

Circuit Court Denial of Rehearing.....35

Dlott – Standing Order Governing Civil Motions For Summary Judgment 36

Dlott – Exhibit A.....39

2004 – Nestle Termination Memo to McKenna.....42

ORDER: Section IX – Protective Order
Section X – Amend Complaint 43

TABLE OF AUTHORITIES

Page

CASES

Aoude v. Mobil Oil Corp.,
892 F. 2d 1115 (1st Cir.1989).....18

Apotex Corp. v. Merck & Co., Inc.,
507 F. 3d 1357 (Fed. Cir. 2007).....18

Broyhill Furn. Ind., Inc. v. Craftmaster Furn. Co.,
12 F. 3d 1080 (Fed.Cir.1993) 18

Christiansburg Garment Co. v. EEOC,
434 US 412 (1978) 43, 46

Faragher v. Boca Raton,
524 US 775 (1998) 31, 48

Fogerty v. Fantasy, Inc.,
510 US 517 (1994) 43, 46, 49

Great Coastal Exp. v. International Broth., ttc.,
675 F. 2d 1349 (4th Cir.1982) 18

Harris v. Forklift Systems, Inc.,
510 US 17 (1993) 31, 48

McKennon v. Nashville Banner Publishing Co.,
513 US 352 (1995) 31, 33, 36, 46, 47, 49

New York Gaslight Club, Inc. v. Carey,
447 US 54 (1980) 43, 46

Oncale v. Sundowner Offshore Services, Inc.,
523 US 75 (1998) 31, 48

Reeves v. Sanderson Plumbing Products, Inc.,
530 US 133 (2000) 42-43

TABLE OF AUTHORITIES
(continued)

Page

CASES

Shepherd v. American Broadcasting Co.'s, Inc.,
62 F. 3d 1469 (DC Cir. 1995).....48

Tex. Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981) 37

STATUTES

42 U.S.C. §2000e– 2(a) 1

42 U.S.C. §2000e– 3(a) 1

RULES

FRCP Rule 56 ..... passim

OTHER AUTHORITIES

Southern District of Ohio – Local Rule
7.2(a)(2) 10

OPINIONS BELOW

The United States District Court, Southern District of Ohio, Eastern Division did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 1-27.

The United States Court of Appeals for the Sixth Circuit issued a per curium order, did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 28-34.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued a *per curium* order on December 23, 2009. Petitioner's timely petition for rehearing and rehearing en-banc was DENIED on March 30, 2010.

On April 13, 2010 Justice Stevens GRANTED Petitioner's Application No. 09A959, and extended the time to file this petition to and including August 27, 2010. This Court has jurisdiction under 28 U.S.C § 1254(1) to review the circuit Court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e– 2(a):

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions,

> or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-cause of such individual's race, color, religion, sex, or national origin." .

42 U.S.C. §2000e– 3(a):

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.".

SUMMARY OF CASE

The lower Courts unlawfully accepted "After Acquired Evidence", non-existent evidence, disregard for requisite totality of circumstances on unheard employment hostile environment claims and the district Court ***fabricated*** facts relied upon in dismissal of all claims and at summary judgment.

STATEMENT OF CASE [1]:

The conduct of the Respondent during these proceedings and the lower Courts has shifted the merits from material issues of this case, to entirely procedural issues.

I. Procedural Background

April 04, 2005 Petitioner Kevin H. McKenna (McKenna) filed an employment discrimination complaint against Nestle with the Ohio Civil Rights Commission (OCRC) [2]. McKenna's OCRC complaint was deferred to the Equal Employment Opportunity Commission (EEOC). June 08, 2010 the EEOC issued notice the charge was being provided to Nestle [3]. June 10, 2005, Nestle received McKenna's complaint from the EEOC [4].

June 15, 2005 Nestle's HR Manager drafted an "Employer Statement" in response to McKenna's EEOC complaint [5]. Significantly the "Employer Statement" drafted by Nestle's *local* HR Manager with "first-hand knowledge" and *directly* involved in the decision to terminate McKenna's employment (Kagenski Dep., p. 201, ll. 1-5), does *not* reference any alleged "*pornographic pictures*"!

July 6, 2005 Nestle submitted Nestle's "Position Statement" to the EEOC now drafted by an attorney from "Nestle North America Legal Depart-

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[1] If deemed material by this Court, a detailed Statement of Facts is on record with the Circuit of Appeals - Doc: 00615599546 Filed: 06/25/2009 Pages: 11-14; *Id.* Pages: 17-34

[2] Doc: 162-6 Filed: 01/26/09 Page: 57 of 77 PAGEID #: 3326

[3] Doc: 3-1 Filed: 10/28/05 Page: 2 of 23 PAGEID #: 41

[4] Doc: 162-6 Filed: 01/26/09 Page: 61 of 77 PAGEID #: 3330

[5] Doc: 162-6 Filed: 01/26/09 Pages: 59-68 of 77 PAGEIDs #: 3328-3337

ment" [6]. Now for the first time Nestle *attorneys* "articulate" that four (4) "*pornographic pictures*" were relied upon for the termination of McKenna's employment [7].

Nestle's "Position Statement" to the EEOC also cites: "E. Ms. Ellis's Complaint to HR, the Investigation and Termination of Mr. McKenna's Employment. On or about September 24, 2004, Mitzi Link – the supervisor of both Ms. Ellis and Mr. McKenna..." [8]. Nestle reiterated before the District Court: "On August 31, 2004, Plaintiff informed Carol Kagenski, Human Resources Manager ("HR")..."; "On or about September 24, 2004, Mitzi Link, supervisor for both Ms. Ellis and Plaintiff, went to HR with a letter that Ms. Ellis received at her residence from Ms. Goss" [9]

August 03, 2005 the EEOC dismissed McKenna's charge 22A-2005-02413 regarding retaliation and sexual discrimination and issued McKenna's "Right to Sue" [10]. On September 22, 2005, the EEOC dismissed charge 220-2005-018868 regarding unlawful discrimination by McKenna's direct supervisor "Mitzi Link" [11].

October 25, 2005, McKenna filed *pro-se*, a complaint against Nestle in the Federal District Court of Southern Ohio, Eastern Division (District

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[6] Doc: 136-9 Filed: 05/22/08 Pages: 3-9 of 15 PAGEIDs #: 2488-2494

[7] Doc: 136-9 Filed: 05/22/08 Page: 6 of 15 PAGEID #: 2491

[8] Doc: 136-9 Filed: 05/22/08 Page: 5 of 15 PAGEID #: 2490; Judicial Admission to EEOC "Position Statement" - Doc: 162-3 Filed: 01/26/09 Page: 5 of 7 PAGEID #: 3126

[9] Doc: 18 Filed: 03/07/06 Pages: 2-3 of 10 PAGEIDs #: 159-160

[10] Doc: 3-1 Filed: 10/28/05 Page: 3 of 23 PAGEID #: 42

[11] Doc: 53-1 Filed: 08/21/06 Pages: 4-5 of 15 PAGEIDs #: 746-747

Court). On October 28, '05, McKenna filed an "amended" complaint [12].

II. District Court Proceedings

October 25, 2005 McKenna filed a complaint with the district Court alleging *co-worker* sexual *and retaliatory* harassment, and employer retaliation [13]. On November 2, 2005 McKenna filed an amended complaint directly alleging *retaliatory* act(s)/action(s) by McKenna's co-worker/harasser [14]. McKenna's complaint specifically references as facts to McKenna's claims, that Kagenski was Nestle's "HR Manager" not McKenna's "immediate supervisor" [15], where "Mitzi Link" was McKenna's "immediate supervisor" [16].

November 14, 2005 McKenna filed a motion to appoint counsel [17]. September 11, 2006, ten (10) months after McKenna's request for counsel, the

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[12] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6; Doc: 3 Filed: 10/28/05 Page: 1 of 30 PAGEID #: 10; Doc: 3 Filed: 10/28/05 Pages: 3-6 of 30 PAGEIDs #: 12-15

[13] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at Statements #3, #5 and #6

[14] "... it is by the defendant's own admission, that they actually and explicitly condoned a *retaliatory act against me by my harasser*." (Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12)
"2) Explicitly soliciting and/or tendering *retaliatory actions against me from my harasser*" (Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12).
"• October 4th, 2004 – In direct conflict with the company's "Non-Harassment and Non-Retaliation Policy" (and federal law(s)), Ms. Kagenski explicitly condoned, (if not actually solicited) *retaliatory actions against me from my harasser, Ms. Goss*." (Doc: 3 Filed: 10/28/05 Page: 5 of 30 PAGEID #: 14).

[15] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at ¶1, ¶¶3-5; Doc: 3 Filed: 10/28/05 Page: 4 of 30 PAGEID #: 13 at ¶1

[16] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at ¶2; Doc: 3 Filed: 10/28/05 Page: 4 of 30 PAGEID #: 13 at ¶4-5

[17] Doc: 5 Filed: 11/15/05 Page: 1 of 2 PAGEID #: 94

District Court DENIED McKenna's request "without prejudice to reconsidering that issue at a later stage in the case should it appear appropriate" [18]. December 20, 2006 McKenna renewed McKenna's request for counsel [19]. On September 24, 2007 the district Court DENIED with no reference to "without prejudice" or "reconsideration" at a later time [20]. McKenna has been proceeding *pro-se* since the onset of this litigation without any assistance whatsoever.

March 15, 2006 McKenna served formal response to Nestle's discovery requests [21]. McKenna's response to Interrogatory No. 19 states: "The job detriment the Plaintiff suffered as a result of reporting sexual harassment includes, but is not limited to: *Retaliation by Ms. Goss...*" [22]. McKenna has consistently objected to Nestle's attempts to utilize "discovery" as an instrument to support the termination of McKenna's employment. McKenna's formally served "General Objections" to that extent upon Nestle on March 15, 2006 [23].

July 31, 2006 McKenna filed a Motion to Amend the Complaint, that *due to discovery* since the onset of litigation in regards to McKenna's direct supervisor, Mary "*Mitzi*" Link [24].

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[18] Doc: 58 Filed: 09/11/06 Pages: 1-2 of 4 PAGEIDs #: 793-794

[19] Doc: 65 Filed: 12/20/06 Page: 3 of 3 PAGEID #: 815

[20] Doc: 97 Filed: 09/24/07 Page: 2 of 8 PAGEID #: 1408

[21] Doc: 162-4 Filed: 01/26/09 Page: 27 of 43 PAGEID #: 3155

[22] Doc: 162-4 Filed: 01/26/09 Page: 15 of 43 PAGEID #: 3143 at Interrogatory No. 19

[23] Doc: 162-4 Filed: 01/26/09 Pages: 2-6 of 43 PAGEIDs #: 3130-3134; Dated/Signed Verification at Doc: 162-4 Filed: 01/26/09 Pages: 26-27 of 43 PAGEIDs #: 3154-3155

[24] Doc: 49 Filed: 07/31/06 Page: 2 of 5 PAGEID #: 657

August 21, 2006 McKenna's Reply memorandum to his Motion to Amend the Complaint [25] – Includes "Attachment A" [26], evidencing formal disclosure on March 21, 2006 of charges with the EEOC regarding McKenna's direct supervisor, Mary "*Mitzi*" Link.

February 05, 2007 in Opinion and Order, "Section IX" – The district court GRANTED McKenna's Motion to Amend the Complaint [27]. February 15, 2007 Nestle moved for reconsideration regarding "Section X." to the District Judge regarding a **Protective Order** against Nestle's intrusions into "relationships" [28]. Nestle waived any objection on any "jurisdictional or limitations grounds" on McKenna's Motion to Amend the Complaint when Nestle did not request reconsideration "Section IX" – The GRANT of McKenna's Motion to Amend [29].

Nestle's motion for reconsideration acknowledges McKenna's co-worker retaliatory harassment claim where Nestle argued, "The Sixth Circuit has yet to adopt a cause of action based on a co-workers' retaliatory harassment." [30].

March 31, 2008 without stipulation establishing disputed and undisputed facts, evidence or claims, Nestle filed a *scandalous* [31] "Motion for

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[25] Doc: 53 Filed: 08/21/06 Page: 1 of 9 PAGEID #: 734

[26] Doc: 53-1 Filed: 08/21/06 Page: 1 of 15 PAGEID #: 743

[27] Doc: 77 Filed: 02/05/07 Page: 10 of 11 PAGEID #: 909 **(Appendix p.52)**

[28] Doc: 77 Filed: 02/05/07 Pages: 10-11 of 11 PAGEIDs #: 909-910 **(Appendix pp. 53-54)**

[29] Doc: 78 Filed: 02/15/07 Page: 7 of 8 PAGEID #: 920

[30] Doc: 78 Filed: 02/15/07 Page: 6 of 8 PAGEID #: 919 at ¶3

[31] In violation of a Standing Protective Order: Doc: 77 Filed: 02/05/07 Pages: 10-11 of 11 PAGEIDs #: 909-910 **(Appendix pp. 53-54)**

Summary Judgment" (Nestle MSJ). Nestle's MSJ was supported by innumerable omissions, "After Acquired Evidence", uncorroborated allegations, tampered evidence, perjurious Affidavits, conclusory "articulations", none of which comprise admissible evidence [32].

Nestle's MSJ *again* references McKenna's co-worker retaliation claim: "Plaintiff essentially alleges that *Goss retaliated against him* for reporting Goss's actions to Kagenski" [33]. The *articulations* within Kagenski and DeWitt's affidavits submitted in support of Nestle's MSJ do *not* cite "*pornographic pictures*" were found in McKenna company emails as Nestle *attorneys* articulate [34].

April 1, 2008 McKenna objected to Nestle's MSJ. McKenna *immediately* and simultaneously filed *both* "Formal Notice to the Federal District Court of Southern Ohio, Easter Division, Re: Case No C2-05-976" [35], *and* held "Status Conference re dft's MSJ set for 4/1/2008 at 11:00am by teleconference before Terence P Kemp" [36]. McKenna's objections to Nestle's MSJ included "After Acquired Evidence" at Statement 2(e) [37], and McKenna's handwritten "**Note: It is simply, factually 'impossible' that statements made by Goss in 2006 could have affected Nestle's motives/decisions in 2004!!**" [38].

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[32] Doc: 127 Filed: 03/31/08 [sealed]
[33] Doc: 127 Filed: 03/31/08 [sealed] at p. 12
[34] Doc: 127 Filed: 03/31/08 [sealed] – "Exhibit A" ¶22(1), and "Exhibit C" ¶5 respectively
[35] Doc: 128 Filed: 04/01/08 Pages: 1-4 of 4 PAGEIDs #: 2202-2205
[36] between Doc's #: 127-128
[37] Doc: 128 Filed: 04/01/08 Page: 2 of 4 PAGEID #: 2203
[38] Doc: 128 Filed: 04/01/08 Page: 4 of 4 PAGEID #: 2205

May 22, 2008 McKenna's Opposition Brief to Nestle's MSJ substantially "disputes" or impeached numerous factual misrepresentations made by Nestle. *Significantly*, McKenna *again* objected admissibility of "After Acquired Evidence" cited in Nestle's MSJ [39].

January 26, 2009 McKenna filed a Motion for Leave to File Instanter with McKenna's very tardy Partial Motion for Summary Judgment attached (McKenna Partial MSJ) specifically regarding: "McKenna's direct Supervisor, Mary "*Mitzi*" Link (hereinafter "*Mitzi*") had unlawful discriminatory (in fact both sexual "anti-male" and retaliatory) animus against McKenna" [40].

February 10, 2009 the District Court GRANTED McKenna leave to file McKenna's Partial MSJ [41], instructed Nestle to file its opposition brief in twenty-one (21) days, and McKenna's reply brief within eleven (11) days thereafter. The District Court admonished McKenna to restrict the length of his reply memoranda.

March 04, 2009 Nestle filed an abusive opposition brief to McKenna's Partial MSJ. Nestle misrepresented to the court McKenna had no claim against McKenna's direct supervisor [42]. Accordingly, only three (3) [43] of the thirty-eight (38) pages are in opposition to McKenna's Partial MSJ specifically regarding McKenna's direct supervisor's sexual and retaliatory animus. [44].

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[39] Doc: 136 Filed: 05/22/08 Pages: 20-22 of 27 PAGEIDs #: 2427-2429
[40] Doc: 162-1 Filed: 01/26/09 Pages: 8-9 of 71 PAGEIDs #: 3000-3001
[41] Doc: 163 Filed: 02/10/09 Page: 1 of 2 PAGEID #: 3428
[42] Doc: 165 Filed: 03/04/09 Page: 6 of 38 PAGEID #: 3870 at ¶1
[43] Doc: 165 Filed: 03/04/09 Pages: 9-11 of 38 PAGEIDs #: 3873-3875
[44] Doc: 165 Filed: 03/04/09 Page: 9 of 38 PAGEID #: 3873 at ll. 8-11

The remaining thirty-five (35) pages of Nestle's opposition brief against a *pro-se* plaintiff is a de-facto supplemental brief in support of Nestle's MSJ [45] in violation of *S.D. Ohio Loc. R. 7.2(a)(2)* [46]. Nestle conceded to the Court that Nestle's opposition brief was not responsive to McKenna's Partial MSJ, "In short, this Court is permitted to deny Plaintiff's Motion for Partial Summary Judgment on its own *even if Nestle did not respond to the arguments contained therein*" (*emphasis* added) [47].

Contrary Nestle's previous representation of Goss and McKenna's relationship as a "sexual relationship" made in Nestle's MSJ [48] and contrary to Nestle's evidence submitted in support of Nestle's MSJ by: Ellis Affidavit statements #3 and #4 [49] and Kagenski Affidavit statements #10, #11 and #17 [50], Nestle *libelously* misrepresented to the district Court that McKenna was involved in a "r[redacted]c relationship" with Goss *and* Ellis [51].

March 17, 2009 McKenna filed McKenna's reply brief [52]. McKenna objected to Nestle's exploitation of Nestle's opposition brief as de-facto supplemental memoranda to Nestle's MSJ [53].

March 31, 2009 the District Court issued judgment in this civil-rights case comprised of

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[45] Doc: 127 Filed: 03/31/08 [sealed]

[46] *S.D. Ohio Loc. R.* 7.2(a)(2) states: "No additional memoranda beyond those enumerated will be permitted except upon leave of court for good cause shown".

[47] Doc: 165 Filed: 03/04/09 Page: 9 of 38 PAGEID #: 3873 at ll. 2-3

[48] Doc: 127 Filed: 03/31/08 [sealed] – p. 4, ¶¶ 3-4

[49] Doc: 127 Filed: 03/31/08 [sealed] Exhibit B

[50] Doc: 127 Filed: 03/31/08 [sealed] – Exhibit A

[51] Doc: 165 Filed: 03/04/09 Page: 22 of 38 PAGEID #: 3886 at ll. 12-16

[52] Doc: 166 Filed: 03/17/09 Page: 1 of 24 PAGEID #: 3903

[53] Doc: 166 Filed: 03/17/09 Page: 3 of 24 PAGEID #: 3905 at ll. 3-14

innumerable conclusory/unsupported articulations, highly disputed "After Acquired Evidence", even ***court fabricated*** facts/evidence, all *liberally* construed favorably to the *moving* party. For instance:

1) The district Court adopted Nestle's *libelous* misrepresentation that McKenna had been "r[redacted]cally" involved with Goss *and* Ellis: "Instead, the evidence establishes that Goss's cantankerous behavior towards McKenna was not based on his status as a male, but based on his status as someone with whom she was ro[redacted]-tically involved. Goss treated Ellis, a female, as adversely as McKenna, because Goss believed McKenna and Ellis were r[redacted]cally involved" [54].
2) Accepted *nonexistent evidence* in support of Nestle's proffered reason for the termination of McKenna's employment, counsel's articulation that "*pornographic pictures*" existed in McKenna's company email account: "In the course of investigating McKenna's Outlook folder, Nestle uncovered emails McKenna had sent containing *pornographic pictures* of a female friend and a male stripper in various sexual positions" (*emphasis* added) [55].
3) To dismiss *both* "Gender Discrimination" claim *and* ...
4) ... In support of finding that McKenna could not establish "pretext", contrary to *stipulation by the parties*... the district Court ***fabricated*** that

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[54] Doc: 168 Filed: 03/31/09 Page: 16 of 22 PAGEID #: 3987 at ll. 6-10 **(Appendix p.18 at ll. 11-17)**

[55] Doc: 168 Filed: 03/31/09 Page: 4 of 22 PAGEID #: 3975 **(Appendix p.4)**

> Kagenski, Nestle's HR Manager was McKenna's direct supervisor in establishing that McKenna and Ellis did not report to the same supervisor: "Although Ellis was subject to the same ECP as McKenna (as were all Nestle employees), Ellis did not deal with the same supervisor as McKenna..." [56]; "As already analyzed by this Court, Ellis was not 'similarly situated' to McKenna because she did not deal with the same supervisor as McKenna..." [57].

Furthermore, not only did the district court **DENY** McKenna's Partial MSJ, the district court completely disregarded McKenna's Partial MSJ. This fact is clearly evidenced by: Ninety-five (95) pages of memoranda, three-hundred and sixty-four (364) pages of exhibits for a total of four-hundred and fifty-nine (459) pages of McKenna's Partial MSJ was based upon the *stipulation* that Mary "*Mitzi*" Link was McKenna's direct supervisor. Within McKenna's Partial MSJ "*Mitzi*" was referenced two-hundred and seventeen (217) times; as McKenna's "supervisor" seventy-seven (77) times; and specifically referenced "*Mitzi*" as McKenna's "direct supervisor" thirteen (13) times; for a total of three-hundred and seven (307) references to Mary "*Mitzi*" Link as McKenna's direct supervisor; and the district Court still references *Kagenski* as McKenna's direct supervisor.

June 25, 2009 McKenna's Appellant Brief was filed with the Circuit Court. Significantly, "*Mitzi*" was referenced an *additional* sixty-five (65) times; as

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[56] Doc: 168 Filed: 03/31/09 Page: 14 of 22 PAGEID #: 3985 at ll. 6-8 **(Appendix p.15 at end of page)**

[57] Doc: 168 Filed: 03/31/09 Page: 21 of 22 PAGEID #: 3992 at ll. 12-14 **(Appendix p.24 at ll. 11-14)**

McKenna's "supervisor" an *additional* fifty-three (53) times; and specifically referenced "*Mitzi*" as McKenna's "direct supervisor" an *additional* thirteen (13) times; for a total of one-hundred and thirty-seven (137) *additional* references to Mary "*Mitzi*" Link as McKenna's direct supervisor, for a *total* of four-hundred and forty-four (444) references to Mary "*Mitzi*" Link as McKenna's direct supervisor before the Circuit Court. Furthermore, this issue was raised before the Circuit Court as "**ARGUMENT – A. – Errant Factual Findings:**" [58].

McKenna's Appellant Brief also raised the district Court accepted as admissible evidence of Nestle's proffered reason for the termination of McKenna's employment, counsel's articulation that non-existent "*pornographic pictures*" allegedly existed in McKenna's company email account [59]. McKenna also raised the issue of Nestle's reliance upon and the District Court's "After Acquired Evidence" [60]. McKenna specifically appealed to the Circuit Court, to review McKenna's Partial MSJ, in specific regards to McKenna's immediate supervisor Mary "*Mitzi*" Link [61].

July 27, 2009 Nestle's Opposition Brief conceded: "Nestle concedes that Link was the supervisor for McKenna and Ellis" [62]. Nestle *again* "articulated" without citation to supporting exhibit that "Reasonable Minds Could Only Conclude..." that "*pornographic pictures*" were discovered in

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[58] Doc: 00615599546 Filed: 06/25/2009 Pages: 35-37
[59] Doc: 00615599546 Filed: 06/25/2009 Pages: 64-66
[60] Doc: 00615599546 Filed: 06/25/2009 Pages: 70-72
[61] Doc: 00615599546 Filed: 06/25/2009 Page: 17
[62] Doc: 00615621584 Filed: 07/27/2009 Page: 20 at ll. 10-12

McKenna's company email account [63]. Nestle *again* acknowledges McKenna's *co-worker retaliation* claim at section "VI": "McKenna specifically stated that Goss retaliated against him:" [64].

September 02, 2009 McKenna's Appellant Reply Brief addressed the *libelous* assertion that McKenna had been "r[redacted]cally" involved [65] with Goss and Ellis. McKenna's Appellant Reply Brief disputed Nestle's "articulation" regarding "*pornographic pictures*" [66]. McKenna argued support for McKenna's disregarded co-worker retaliation claim at section "B. COWORKER RETALIATORY HARASSMENT" [67].

December 23, 2009 the Circuit Court affirmed citing:

1) "Kevin H. McKenna, an Ohio resident proceeding *pro-se, appeals a district court's judgment* granting the defendant's motion for summary judgment, *denying McKenna's motion for partial summary judgment*, and dismissing McKenna's amended complaint" [68].
2) "We review the grant or denial of summary judgment *de novo. Yeschick v. Mineta*, 521 F.3d 498, 502 (6th Cir. 2008)" [69].
3) "Instead, the evidence shows that the alleged harassers' actions toward McKenna were based on personal conflict resulting from the fact that

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[63] Doc: 00615621584 Filed: 07/27/2009 Page: 24
[64] Doc: 00615621584 Filed: 07/27/2009 Page: 30
[65] Doc: 00616152349 Filed: 09/02/2009 Pages: 11-20
[66] Doc: 00616152349 Filed: 09/02/2009 Pages: 72-78
[67] Doc: 00616152349 Filed: 09/02/2009 Pages: 44-47
[68] Doc: 00618042195 Filed: 12/23/2009 Page: 1 at ll. 1-3
(Appendix p.28 at ll. 1-5)
[69] Doc: 00618042195 Filed: 12/23/2009 Page: 2 at ll. 3-4
(Appendix p.29 at ll. 13-14)

McKenna had engaged in r[redacted]c relationships with them" [70].

4) "McKenna has established that he engaged in a protected activity when he complained to his *supervisor Carol Kagenski*, concerning a co-worker's actions [71].
5) "Nestle asserts that it terminated McKenna's employment because he violated the terms of its Electronic Communications Policy ("ECP") by sending and receiving *sexually explicit* emails and *photos* using his work computer [72].

On January 06, 2010 McKenna filed a Petition for Rehearing raising issues of:

1) The *libelously* represented "r[redacted]c relationship" [73].
2) Circuit Courts dereliction of duty to conduct "de novo" review perpetuating the misrepresentation that McKenna's supervisor was Kagenski [74].
3) "Totality of Circumstances" [75].
4) "Retaliatory Harassment" Supervisory and Co-worker [76].
5) "After Acquired Evidence" [77].

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[70] Doc: 00618042195 Filed: 12/23/2009 end of Page 2 – begin of Page 3 **(Appendix p.30 at ll. 23-27)**

[71] Doc: 00618042195 Filed: 12/23/2009 Page: 3 at ¶3 **(Appendix p.31 at end of page)**

[72] Doc: 00618042195 Filed: 12/23/2009 Page: 4 at ll. 3-5 **(Appendix p.32 at ¶2)**

[73] Doc: 00618354969 Filed: 01/06/2010 Pages: 11-13

[74] Doc: 00618354969 Filed: 01/06/2010 Pages: 13-14

[75] Doc: 00618354969 Filed: 01/06/2010 Page: 17

[76] Doc: 00618354969 Filed: 01/06/2010 Page: 18

[77] Doc: 00618354969 Filed: 01/06/2010 Page: 19

January 11, 2010 pursuant to 6 Cir. Rule 46, McKenna filed a complaint of "Attorney Misconduct" with the Circuit Court. McKenna's complaint references *instances* in which *perjury* had been expressly raised within the body of briefings before the federal judiciary:

May 22, 2008 – Federal District Court, McKenna's Opposition to Nestle's Motion for Summary Judgment [78]; *January 26, 2009* – Federal District Court, McKenna's Partial Motion for Summary Judgment, [79]; *March 17, 2009* – Federal District Court, McKenna's Partial Motion for Summary Judgment - REPLY Memorandum, [80]; *June 25, 2009* – Sixth Circuit of Appeals, *Pro-Se* Appellant's Brief [81]; *September 2, 2009* – Sixth Circuit of Appeals, *Pro-Se* Appellant's REPLY Brief, [82].

February 2, 2010, the Circuit Court issued notice McKenna's complaint was docketed as **Case No. 10-9501** [83]. McKenna's initial complaint "clearly and convincingly" evidences "Fraud on the Court", subornation of fraud, perjury, and evidence tampering. McKenna has repeatedly supplemented **Case No. 10-9501** with further evidence of "Attorney Misconduct".

March 30, 2010 the Circuit Court disregarded McKenna's pending complaint of "Attorney Misconduct" and **DENIED** McKenna's petition for rehearing [84]

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[78] Doc: 136 Filed: 05/22/08 Pages: 5-7 of 27 PAGEIDs #: 2412-2414
[79] Doc: 162-1 Filed: 01/26/09 Page: 49 of 71 PAGEID #: 3041 at FN149
[80] Doc: 166 Filed: 03/17/09 Pages: 18-19 of 24 PAGEIDs #: 3920-3921
[81] Doc: 0061559954 Pages 82-86
[82] Doc: 00616152349 Pages 60-61 and pp. 69-72
[83] Application 09A959, Attachment B at p. 38
[84] Doc: 00619964974 Filed: 03/30/2010 Page: 1

April 13, 2010 Justice Stevens GRANTED Petitioners Application No. 09A959 extending the time to file a petition for a writ of certiorari by 60 days, to and including August 27, 2010.

July 13, 2010, McKenna served Notice upon the Circuit Executive also supplemented to **Case No. 10-9501**, in an attempt to expedite administrative resolution of the material issues of "Attorney Misconduct".

August 03, 2010 pursuant to the Federal Rules of Civil Procedure Rule 60(d)(3) McKenna filed "Plaintiff's Motion Set Aside a Judgment For Fraud on the Court" [85], again providing "clear and convincing evidence" to the lower Courts of "Attorney Misconduct".

ARGUMENT

I. "Fraud on the Court"

By leaving McKenna's January 11, 2010 [86] and August 03, 2010 [87] complaints of "Attorney Misconduct"/"Fraud on the Court" unresolved within the context of summary judgment, where law mandates all disputes are *liberally* construed favorably to the non-moving *pro-se* litigant; perversely raises McKenna's evidentiary burden *beyond* "preponderance of the evidence" requirement in civil proceedings, to a "clear and convincing" evidentiary burden against a non-moving party in the context of summary judgment.

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[85] Doc: 176 Filed: 08/03/10 Page: 1 of 6 PAGEID #: 4018
[86] Sixth Circuit Case No. 10-9501 [sealed]
[87] Doc: 176 Filed: 08/03/10 Page: 1 of 6 PAGEID #: 4018

> "A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier *or unfairly hampering the presentation of the opposing party's claim* or defense" (*emphasis* added) *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir.1989).
>
> "Thus "fraud on the court" is typically confined to the most egregious cases, such as bribery of a judge or juror, *or improper influence exerted on the court by an attorney*, in which the integrity of the court and its ability to function impartially is directly impinged. (*emphasis* added) *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 1085-86 (Fed.Cir.1993) citing *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir.1982); Cf. *Apotex Corp. v. Merck & Co., Inc.*, 507 F.3d 1357, 1361 (Fed. Cir. 2007).

a. **Fraud on the Court – Party:**

i. **"R[redacted]c Relationship"**

Contrary Nestle's representation of a "sexual relationship" made in support of Nestle's MSJ on March 31, 2008 [88], contrary to evidence submitted in support of Nestle's MSJ by: Ellis Affidavit statements #3 and #4 [89]; Kagenski Affidavit statements

[88] Doc. 127: [sealed] – p. 4, ¶¶ 3-4
[89] Doc. 127: [sealed] – Exhibit B

#10, #11 and #17 [90]. Contrary to McKenna and Goss the actual parties to the "relationship", McKenna's Interrogatory response filed in support of McKenna's Partial MSJ [91] Goss's deposition testimony, *Goss Depo. Tr.* p. 19, ll. 18-24:

18 A. Kevin and I had a relationship.
19 MR. McKENNA: You're also assuming facts not
20 admitted into evidence.
21 Q. What type of relationship was it?
22 A. Kevin and I had -- initially had a working
23 relationship which became a friendship which became a
24 *sexual relationship.*

Nestle utilized it's opposition brief to McKenna's Partial MSJ regarding Supervisory Sexual and Retaliatory Harassment, as a supplemental pleading made without leave of court in support of Nestle's MSJ, *defaming* McKenna, McKenna's wife and McKenna's marriage by *libelously* publishing:

> "Goss's behavior towards Plaintiff was not based on his status as a male, but based on his status as someone with whom she was *ro*[redacted]*tically* involved. Goss treated Ellis, a female, adversely as well because Goss believed Plaintiff and Ellis were *r*[redacted]*cally* involved." [92].

The District Court adopted Nestle's *libelous* "articulation" then liberally construed most favorably to the moving party as to what such a relationship

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[90] Doc: 127: [sealed] – Exhibit A
[91] Interrogatory No. 9: Doc: 162-4 Filed: 01/26/09 Pages: 39-40 of 43 PAGEID #: 3167-3168
[92] Doc: 165 Filed: 03/04/09 Page: 22 of 38 PAGEID #: 3886 at ll. 12-15

"*can be*" in dismissing McKenna's sexual harassment claim on March 31, 2009 stating:

> "Instead, the evidence establishes that Goss's cantankerous behavior towards McKenna was not based on his status as a male, but based on his status as someone with whom she was r[redacted]cally involved. Goss treated Ellis, a female, as adversely as McKenna, because Goss believed McKenna and Ellis were ro[redacted]-tically involved. (McKenna Depo. Tr. at p. 343; Goss Depo Tr. at p. 36.) Thus, Goss's behavior *can be* described merely as "personal animosity," which is not the equivalent of sexual harassment." [93].

Contrary to the notion of "*de novo review*" and being presented with citations to the record that Goss's animus towards McKenna was "based on sex" [94], the Circuit Court deferred to the District Court's unsupported finding in affirming dismissal of McKenna's sexual harassment claim on December 23, 2009 stating:

> "Instead, the evidence shows that the alleged harassers' actions toward McKenna were based on personal conflict resulting from the fact that McKenna had engaged in *r*[redacted]*c* relationships with them" [95].

There is no evidence on any record that establishes that McKenna has shared a "r[redacted]c"

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[93] Doc: 168 Filed: 03/31/09 Page: 16 of 22 PAGEID #: 3987 at ll. 6-12 **(Appendix p.18 at ll. 18-20)**

[94] Doc: 00616152349 Filed: 09/02/2009 Pages: 11-20

[95] Doc: 00618042195 Filed: 12/23/2009 end of Page 2 – begin of Page 3 **(Appendix p.30 at ll. 23-27)**

relationship with McKenna's STALKER, Goss. Not even the delusional, psychotic STALKER Goss has ever inferred that Goss and McKenna shared a "r[redacted]c" relationship.

ii. **Supervisory "Hostile Environment" (Also Totality of Circumstances)**

On July 31, 2006 McKenna filed a Motion to Amend McKenna Complaint due to *discovery* subsequent to the onset of litigation [96].

> **"PLAINTIFF'S "SUPPLEMENTAL STATEMENT OF CLAIM" (JULY 21, 2006):**
>
> The Plaintiff, Kevin H. McKenna's "Supplemental Statement of Claim" is: That in addition to the Claims set forth within the original "Statement of Claim" is that: I, Kevin H. McKenna was subjected to an unlawful, "Hostile Environment" because of my "sex". My co-workers and immediate supervisor Mary "Mitzi" Link imposed this hostile environment upon me. The Defendant's upper management and supervision failed to remedy, acquiesced it, if not actually supported and/or sponsored the unlawful acts." [97].

On August 21, 2006 McKenna's Reply memorandum to his Motion to Amend the Complaint [98] – Includes "Attachment A" [99], evidencing formal disclosure made upon Nestle's Attorneys regarding charges regarding McKenna's direct supervisor filed

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[96] Doc: 49 Filed: 07/31/06 Page: 2 of 5 PAGEID #: 657
[97] Doc: 49-2 Filed: 07/31/06 Page: 2 of 2 PAGEID #: 662
[98] Doc: 53 Filed: 08/21/06 Page: 1 of 9 PAGEID #: 734
[99] Doc: 53-1 Filed: 08/21/06 Page: 1 of 15 PAGEID #: 743

with the EEOC on March 21, 2006 shortly after the onset of discovery in the case.

On February 05, 2007 in Opinion and Order, Section IX – The district court GRANTED McKenna's Motion to Amend the Complaint citing:

> "If Nestle believes the claim is then subject to dismissal on jurisdictional or limitations grounds, it may file an appropriate motion and obtain a ruling from the District Judge assigned to the case." [100].

On February 15, 2007 Nestle requested reconsideration of "Section X." to the District Judge regarding a Protective Order against Nestle's intrusive discovery practices [101]. Nestle waived any objection on any "jurisdictional or limitations grounds" when Nestle did not request reconsideration of "Section IX" – The district court GRANT of McKenna's Motion to Amend.

On January 26, 2009 McKenna filed McKenna's Partial MSJ in specific regards to: "McKenna's direct Supervisor, Mary "*Mitzi*" Link (hereinafter "*Mitzi*") had unlawful discriminatory (in fact both sexual "anti-male" and retaliatory) animus against McKenna" [102].

On March 04, 2009 in opposition to McKenna's Partial MSJ, Nestle misrepresented to the district court that McKenna had no claim(s) against McKenna's direct supervisor:

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[100] Doc: 77 Filed: 02/05/07 Page: 9 of 11 PAGEID #: 908
[101] Doc: 78 Filed: 02/15/07 Page: 7 of 8 PAGEID #: 920
[102] Doc: 162-1 Filed: 01/26/09 Pages: 8-9 of 71 PAGEIDs #: 3000-3001

> "I. Introduction:
>
> On October 25, 2005, Plaintiff Kevin H. McKenna (hereinafter "Plaintiff") filed his Complaint. See doc. #1. On November 2, 2005, Plaintiff filed and Amended Complaint. See Doc. #3. Plaintiff's Complaint and Amended Complaint never once state, of even suggest, that Mitzi Link (hereinafter "Link") discriminated against Plaintiff; yet, a large portion of Plaintiff's Partial Motion for Summary Judgment (hereinafter "Plaintiff's Motion") discusses alleged discrimination by Link. *There is no claim for relief contained or sought within any of Plaintiff's complaint for discrimination based upon Link's alleged conduct.* [103]

Nestle deceives the Court by citing McKenna's initial Complaint, while averting the Court's attention away McKenna's subsequent assertion of a claim against McKenna's direct supervisor Mary "*Mitzi*" Link. Consequentially the lower Courts' have completely disregarded McKenna's claim against his direct supervisor Mary "*Mitzi*" Link. That *fact* is inarguably evidenced by: *neither* of the lower Courts apprehends the supreme material fact that Mary "*Mitzi*" Link is McKenna's direct supervisor, and perversely cites Kagenski as McKenna's supervisor [104].

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[103] Doc: 165 Filed: 03/04/09 Page: 6 of 38 PAGEID #: 3870 at ¶1

[104] Doc: 168 Filed: 03/31/09 Page: 3 of 22 PAGEID #: 3974 at ll. 1-2 **(Appendix p.3 at ll. 7-8);**
Doc: 00618042195 Filed: 12/23/2009 Page: 3 at ¶3 **(Appendix p.31 at end of page)**

b. **Fraud on the Court (by Omission) - Party**

i. **Omission of Co-worker Retaliatory Harassment Claim (Also Totality of Circumstances)**

Sufficient Notice of McKenna's Co-worker Retaliatory Harassment Claim:

October 25, 2005 McKenna filed a complaint with the district Court alleging *co-worker* sexual *and retaliatory* hostile environment, and employer retaliation [105]. On November 2, 2005 McKenna filed an amended complaint directly alleging *retaliatory* act(s)/action(s) against McKenna by his co-worker/ harasser:

1) "... it is by the defendant's own admission, that they actually and explicitly condoned a *retaliatory act against me by my harasser.*" [106].
2) "2) Explicitly soliciting and/or tendering *retaliatory actions against me from my harasser*" [107].
3) "• October 4th, 2004 – In direct conflict with the company's "Non-Harassment and Non-Retaliation Policy" (and federal law(s)), Ms. Kagenski explicitly condoned, (if not actually solicited) *retaliatory actions against me from my harasser, Ms. Goss.*" [108].

On March 15, 2006 McKenna served formal response to Nestle's *first* discovery requests [109]. In

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[105] Doc: 1 Filed: 10/25/05 Page: 6 of 7 PAGEID #: 6 at Statements #3, #5 and #6
[106] Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12
[107] Doc: 3 Filed: 10/28/05 Page: 3 of 30 PAGEID #: 12
[108] Doc: 3 Filed: 10/28/05 Page: 5 of 30 PAGEID #: 14
[109] Doc: 162-4 Filed: 01/26/09 Page: 27 of 43 PAGEID #: 3155

response to Nestle's Interrogatory No. 19, McKenna stated: "The job detriment the Plaintiff suffered as a result of reporting sexual harassment includes, but is not limited to: *Retaliation by Ms. Goss...*" [110].

On February 15, 2007 in Nestle's request for reconsideration, Nestle acknowledges McKenna's co-worker retaliatory harassment claim at section "C." where Nestle argued, "The Sixth Circuit has yet to adopt a cause of action based on a co-workers' retaliatory harassment." [111].

On March 31, 2008 Nestle's MSJ *again* references McKenna's co-worker retaliation claim: "Plaintiff essentially alleges that *Goss retaliated against him* for reporting Goss's actions to Kagenski" [112]. Despite Nestle's irrefutable knowledge of McKenna's Supervisory and Co-worker retaliatory harassment claims, Nestle's MSJ [113] misrepresents that McKenna's claims against Nestle were solely "sexual harassment" and "retaliatory termination".

The "SUMMARY" within Nestle's MSJ at page "ii", ¶2 misrepresents a sole "retaliation" claim by termination of McKenna's employment. At ¶4 Nestle misrepresents a sole claim of "sexual harassment". Nestle reiterates misrepresenting McKenna's claims in the "Memorandum in Support – Introduction": "Plaintiff's Complaint asserts a claim for *retaliation* and *sexual harassment*" [114]. Nestle's "CONCLUSION" reiterates that Nestle is entitled to "summary

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[110] Doc: 162-4 Filed: 01/26/09 Page: 15 of 43 PAGEID #: 3143 at Interrogatory No. 19

[111] Doc: 78 Filed: 02/15/07 Page: 6 of 8 PAGEID #: 919 at ¶3

[112] Doc: 127 Filed: 03/31/08 [sealed] at p. 12

[113] Doc: 127 Filed: 03/31/08 [sealed]

[114] Doc: 127 Filed: 03/31/08 [sealed] at p. 2

judgment" on the basis of "retaliation" by wrongful termination and "sexual harassment" [115].

The district Court's reliance on Nestle's misrepresentations is irrefutable: "This matter is before the Court on Defendant's and Plaintiff's Cross Motions for Summary Judgment. Plaintiff Kevin McKenna ("McKenna") sued Nestle Purina Petcare ("Nestle"), his former employer, asserting a claim for *retaliatory termination* and a claim for *sexual harassment*." (*emphasis* added) [116]. "For the foregoing reasons, the Court... ... GRANTS Nestle's Motion for Summary Judgment with respect to *all* of McKenna's claims" (*emphasis* added) [117].

ii. Omission of Material Facts

Nestle clearly has the capacity to accurately portray the roles of material individuals in this case:

1) On July 6, 2005 Nestle stated in Nestle's "Position Statement" to the EEOC "E. Ms. Ellis's Complaint to HR, the Investigation and Termination of Mr. McKenna's Employment. On or about September 24, 2004, Mitzi Link – the supervisor of both Ms. Ellis and Mr. McKenna..." [118].
2) On March 07, 2006 Nestle reiterated to the district court, "On August 31, 2004, Plaintiff informed Carol Kagenski, Human Resources

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[115] Doc: 127 Filed: 03/31/08 [sealed] at p. 28, ll. 3-6

[116] Doc: 168 Filed: 03/31/09 Page: 1 of 22 PAGEID #: 3972 at "Introduction" **(Appendix p.1)**

[117] Doc: 168 Filed: 03/31/09 Page: 22 of 22 PAGEID #: 3993 at "Conclusion" **(Appendix p.25)**

[118] Doc: 136-9 Filed: 05/22/08 Page: 5 of 15 PAGEID #: 2490; Judicial Admission to EEOC Position Statement - Doc: 162-3 Filed: 01/26/09 Page: 5 of 7 PAGEID #: 3126

> Manager ("HR")..."; "On or about September 24, 2004, Mitzi Link, supervisor for both Ms. Ellis and Plaintiff, went to HR with a letter that Ms. Ellis received at her residence from Ms. Goss" [119].

However in Nestle's MSJ to deceive the Court by omission that Mary "*Mitzi*" Link was Ellis and McKenna's "direct supervisor", Nestle portrayed "*Mitzi*" as merely *another Nestle Supervisor*:

> "In the meantime, Goss approached *another Nestle supervisor*, Mitzi Link (hereinafter "Link")..." [120].

Nestle's omission of this supreme material fact opportuned the district Court to ***fabricate*** who McKenna's direct supervisor was.

c. Fraud on the Court – lower Courts

i. District Court

In disposing of all McKenna's claims, the district Court disregarded (459) pages of citations, exhibits and evidence within McKenna's Partial MSJ with three-hundred and seven (307) references to Mary "*Mitzi*" Link as McKenna's direct supervisor; without any possible supporting evidence the district Court assigned Kagenski the Human Resources Manager as McKenna's direct supervisor:

> "Shortly thereafter, on August 31, 2004, *McKenna met with his immediate supervisor, Carol Kagenski* ("Kagenski"), and complained

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[119] Doc: 18 Filed: 03/07/06 Pages: 2-3 of 10 PAGEIDs #: 159-160
[120] Doc: 127 Filed: 03/31/08 [scaled] at p. 6, ll. 15-16

about Goss's changed, more hostile, demeanor towards him" (*emphasis* added) [121].

The district Court utilized that misrepresentation as an instrument to establish that McKenna and Ellis did not report to the same supervisor to dispose of McKenna's claims: "Although Ellis was subject to the same ECP as McKenna (as were all Nestle employees), Ellis did not deal with the same supervisor as McKenna..." [122]: "As already analyzed by this Court, Ellis was not 'similarly situated' to McKenna because she did not deal with the same supervisor as McKenna..." [123].

ii. **Circuit Court**

"We review the grant or denial of summary judgment de novo" [124]. The *de novo* standard of review affords no deference to the lower court.

1. **Circuit Court Complete Disregard for "*de novo review*" (Re: McKenna's Supervisor)**

On June 25, 2009 McKenna's Appellant Brief cited one-hundred and thirty-seven (137) *additional* references to Mary "*Mitzi*" Link as McKenna's direct supervisor, for a *grand total* of four-hundred and forty-four (444) references to Mary "*Mitzi*" Link as McKenna's direct supervisor before the Circuit Court. Furthermore, this exact issue was raised as

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[121] Doc: 168 Filed: 03/31/09 Page: 3 of 22 PAGEID #: 3974 at ll. 1-3 **(Appendix p.3 at ll. 7-8)**

[122] Doc: 168 Filed: 03/31/09 Page: 14 of 22 PAGEID #: 3985 at ll. 6-8 **(Appendix p.15 at end of page)**

[123] Doc: 168 Filed: 03/31/09 Page: 21 of 22 PAGEID #: 3992 at ll. 12-14 **(Appendix p.24 at ll. 11-14)**

[124] Doc: 00618042195 Filed: 12/23/2009 Page: 2 at l. 3 **(Appendix p.29 at l. 13)**

"ARGUMENT – A. – Errant Factual Findings:" before the Circuit of Appeals [125].

On July 27, 2009 Nestle's Opposition Brief conceded: "McKenna argues that the District Court erred in determining McKenna and Ellis were not similarly situated because they did not share the same supervisor. Nestle concedes that Link was the supervisor for McKenna and Ellis" (emphasis added) [126].

On December 23, 2009 in deference to the district Court, the Circuit Court *republished* the district Court's fatal error, "... when he complained to his supervisor Kagenski" [127].

This representation was ***fabricated*** by the district Court on March 31, 2009, and only exists within the District Court's Order and Opinion. For this exact same error to repeat itself within the Circuit Court's Order after it was expressly raised and conceded to by Nestle before the Circuit Court, it is self-evident that the Panel has not discharged its self-stated duty to review this case "de novo" as is required by law.

2. Circuit Court Complete Disregard for Review of McKenna's Partial MSJ

McKenna specifically appealed to the Circuit Court, to review McKenna's Partial MSJ, in specific regards to McKenna's immediate supervisor Mary "*Mitzi*" Link:

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[125] Doc: 00615599546 Filed: 06/25/2009 Pages: 35-37
[126] Doc: 00615621584 Filed: 07/27/2009 Page: 20 at ll. 10-12
[127] Doc: 00618042195 Filed: 12/23/2009 Page. 3 at ll. 22-23

(Appendix p.31 at end of page)

> McKenna also humbly and not only *requests this Court review* (the admittedly very tedious/onerous task) de novo the District Courts DENIAL of *McKenna's (Pro-Se) Partial Motion for Summary Judgment*, not only *on its own merits*, but additionally the facts and evidence also there within, be justly considered (most favorably to McKenna) in opposition to Nestle's Motion for Summary Judgment [128].

The Circuit Court judgment acknowledged McKenna's appeal requesting review of the district Court's denial of McKenna Partial MSJ regarding McKenna's direct supervisor's *retaliatory harassment* of McKenna:

> "Kevin H. McKenna, an Ohio resident proceeding *pro-se*, *appeals a district court's judgment* granting the defendant's motion for summary judgment, *denying McKenna's motion for partial summary judgment*, and dismissing McKenna's amended complaint" [129].

The Circuit Court's disregard for review the district Court's denial of McKenna's Partial MSJ is evidenced by the complete absence within the Circuit Court's Order, *and* further evidenced by the fact the Circuit Court references Kagenski as McKenna's supervisor [130].

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[128] Doc: 00615599546 Filed: 06/25/2009 Page: 17

[129] Doc: 00618042195 Filed: 12/23/2009 Page: 1 at ll. 1-3
(Appendix p.28 at ll. 1-5)

[130] Doc: 00618042195 Filed: 12/23/2009 Page: 3 at ¶3
(Appendix p.31 at end of page)

II. "Totality of Circumstances"

> "[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. at 2283

Nestle's unconscionable scheme calculated to misrepresent McKenna's claims to the lower Courts, and the lower Courts consequential adoption of that misrepresentation and subsequent disregard of McKenna's Supervisory *and* Co-worker Retaliatory Harassment Claims, makes the dismissal of *any* of McKenna's claims against Nestle untenable.

III. Inadmissible Evidence

a. After Acquired Evidence

> "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. at 362-63.

McKenna has consistently objected to Nestle's exploitation of "After Acquired Evidence".

March 15, 2006 McKenna formally served McKenna's "General Objections" to that extent upon Nestle [131].

April 1, 2008 *within less than 19 hours* of actual electronic service of Nestle's MSJ on March 31, 2008 at 5:50PM; McKenna's objection was drafted and including over an hours travel time from Zanesville to Columbus, Ohio manually time-stamped and filed by the district Court "08 APR-1 PM 12:49" [132]. McKenna's *immediate* objection to Nestle's MSJ included inadmissible "After Acquired Evidence" at Statement 2(e) [133], and McKenna's handwritten "**Note: It is simply, factually 'impossible' that statements made by Goss in 2006 could have affected Nestle's motives/decisions in 2004!!**" [134].

May 22, 2008 McKenna's Opposition Brief to Nestle's MSJ again objected admissibility of "After Acquired Evidence" cited in Nestle's MSJ [135].

June 25, 2009 McKenna's Appellant Brief also raised the issue of Nestle's reliance upon and the District Court's *carte-blanche* acceptance of Nestle's "After Acquired Evidence" [136].

January 06, 2010 McKenna's Petition for Rehearing raised the issue of Abuse of "After Acquired Evidence" [137].

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[131] Doc: 162-4 Filed: 01/26/09 Pages: 2-6 of 43 PAGEIDs #: 3130-3134. Dated/Signed Verification at Doc: 162-4 Filed: 01/26/09 Pages: 26-27 of 43 PAGEIDs #: 3154-3155

[132] Doc: 128 Filed: 04/01/08 Page: 1 of 4 PAGEID #: 2202

[133] Doc: 128 Filed: 04/01/08 Page: 2 of 4 PAGEID #: 2203

[134] Doc: 128 Filed: 04/01/08 Page: 4 of 4 PAGEID #: 2205

[135] Doc: 136 Filed: 05/22/08 Pages: 20-22 of 27 PAGEIDs #: 2427-2429

[136] Doc: 00615599546 Filed: 06/25/2009 Pages: 70-72

[137] Doc: 00618354969 Filed: 01/06/2010 Page: 19

In this case, the perversion of Nestle's reliance upon "After Acquired Evidence" is more egregious than as articulated by this Court in *McKennon*. Nestle's reliance upon "After Acquire Evidence" procured from *Goss* against McKenna is three-fold:

1) "After Acquired Evidence (*McKennon*): *Any* evidence whatsoever, such as Goss's deposition in October of 2006 that was *acquired* by Nestle *after* the decision to terminate McKenna's employment on October 14, 2004 is *inadmissible* by the doctrine of "After Acquired Evidence". *Any* evidence, fact or articulation that is now supported by any variation of "*Goss Depo. Tr.*" submitted in support of either lower Court's judgments and/or Nestle's MSJ, is *inadmissible*.

2) Harassment (sexual and retaliatory): Goss's allegations are part and parcel to the sexual *and* retaliatory harassment by Goss that McKenna adamantly complains of as McKenna's punishment for not submitting to Goss's sexual desires *and* complaining of Goss's harassment to Nestle's HR Manager. *Any* act whatsoever by Nestle opportuning Goss to *now* impugn McKenna in *any* way, is express sponsorship by Nestle of Goss's sexual *and* retaliatory harassment upon McKenna.

It is only *after* McKenna no longer submitted to Goss's *sexual* demands *at the workplace* in July 2004, *and* only *after* McKenna *complained* of Goss's sexual harassment to Nestle's HR Manager on August 31, 2004 at approximately 10:00AM; that Goss has *now* stated *any* objection to *any* alleged workplace "misconduct" by McKenna and jeopardizing McKenna's employment.

3) Nestle's *self-made* "**Catch-22**": On October 19, 2004 merely five (5) days after the termination of McKenna's employment, Nestle could not have made it any clearer: The termination of McKenna's employment was completely unrelated to *Goss* and/or Kagenski [138]:

October 19, 2004

Kevin McKenna
4885 Adamsville Road
Zanesville, Ohio 43701

Kevin:

This correspondence is provided to you in response to your e-mail dated October 18, 2004.

The decision, which led to your termination of employment, was based on your violation of the Information Security Policy as it relates to electronic communications. Additionally, you admitted to this violation. *Furthermore, your termination has no relationship to any previous conversations you may have had with our local HR Manager.*

At this time, we do not see need for continued discussion regarding this matter.

Regretfully,

Mitzi Link
Controller

cc: Dante Benincasa
Carol Kagenski

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[138] **See Appendix p.42**; Authenticated at - Doc: 162-5 Filed: 01/26/09 Page: 96 of 98 PAGEID #: 3267

It is now quite disingenuous of Nestle to cite *Goss* in *any* relationship to the termination of McKenna's employment, let alone by "After Acquired Evidence", from no less than Goss whom Nestle states McKenna's termination was unrelated to, whom happens to be the harasser of McKenna, and who's harassment McKenna complained of.

To illustrate only one of innumerable particularly perverse manifestations of Nestle's exploitation of "After Acquired Evidence" for this Court; in Nestle's MSJ, [139], Nestle cites "*Goss Depo. Tr.* p. 97, ll. 5-24":

Q. Here's *Defendant's Exhibit 26.* The last -- first message on the page is March 15th, 2004, it's from Kevin to you. The "B"rownies, what is that referring to?
A. B was my nickname for Kevin. It stood for boys which goes back to that whole Natasha thing. Apparently there were brownies at work that day.
Q. That's not referring to anything else?
A. Well, it's talking about warming them up, *I think -- I don't recall* exactly what we were talking about, but it had something to do with him either coming on the brownies *or something like that.* I can't remember exactly now.
Q. And what are you referring to in your March 15th, 2004, e-mail that's just above that?
A. What specifically are you asking me about what was I referring to?
Q. I mean, is that an inside joke between you two? Is that sexual content?
A. I would say that's sexual content.

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[139] Doc: 127 Filed: 03/31/08 [sealed] at page 16 of 32 at ¶2

First: There is no "*Defendant's Exhibit 26*" on the record. Second: That is 2006 *After Acquired, hear-say* deposition testimony, over two (2) years *after* McKenna's termination, where Goss is speaking for McKenna's state of mind. Third: This is mere *speculation* (i.e. – "*or something like that*") on Goss's part, clearly stating: "*I don't recall*", "*I can't remember*". That does not "establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone" (*McKennon*).

The District Court cast as a *finder of fact* (i.e. – "This is not true.") relied on Nestle's an extrapolated "articulation" of After Acquired Evidence from Goss's deposition testimony, in support of Nestle's proffered reason(s) for the termination of McKenna's employment as a basis for dismissing all McKenna's claims against Nestle:

> "McKenna asserts that the emails he wrote did not contain sexual innuendo, and that Goss's interpretation is "delusional." This is not true. The emails that McKenna sent to Goss were clearly indecent and contained sexually explicit content. *For instance, one of these emails included a description of McKenna masturbating at work and ejaculating onto* brownies. *McKenna's assertion is unfounded.*" (emphasis added) [140].

No such email exists! Clearly Goss's "After Acquired" deposition testimony "*Goss Depo. Tr.* p. 97, ll. 5-24" is *not* an email of McKenna committing lewd

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[140] Doc: 168 Filed: 03/31/09 Page: 4 of 22 PAGEID #: 3975 at FN 2 **(Appendix pp.25-26)**

acts! Goss's October *2006* speculation(s) *cannot* have provided a basis for Nestle's termination of McKenna's employment in 2004.

b. **Nonexistent Evidence - "4 *Pornographic Pictures*" Do NOT Exist on the Record**

The defendant must articulate a legitimate, non-discriminatory reason for the employment decision. To meet this burden, "the defendant must clearly set forth, *through the introduction of admissible evidence*, the reasons for the plaintiff's rejection" (*emphasis* added). *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). "An articulation not admitted into evidence will not suffice. Thus, *the defendant cannot meet its burden* merely through an answer to the complaint or *by argument of counsel*." (*emphasis* added) *Id.* at 256 n. 9, 101 S.Ct. 1089.

It is axiomatic that if an employer *legitimately* terminated an employee's employment on such an *obvious* violation of an employer's policy, such as the employee having "4 *pornographic pictures*" in the employee's company email account; the employer would simply file an *immediate* motion for summary judgment with "Exhibit A", "Exhibit B", "Exhibit C", "Exhibit D" as attachments, and "Case DISMISSED!".

It is also axiomatic that *any* employee would *not* endure five (5) years of litigation *and* be petitioning the Supreme Court, if the employer *legitimately* terminated the employee's employment on such an *obvious* violation of an employer's policy, such as the employee having "4 *pornographic pictures*" in the employee's company email account.

Any reader of this Petition must ask the obvious questions; if Nestle were *legitimately* in possession of "4 *pornographic pictures*": 1) Why wouldn't Nestle *immediately* move for summary judgment? 2) Why wouldn't Nestle *prominently* support *any* motion for summary judgment with "*Exhibit A*", "*Exhibit B*", "*Exhibit C*", and "*Exhibit D*" of "4 *pornographic pictures*"? 3) Why would McKenna *vehemently* protest, endure five (5) years of vexatious litigation, and Petition the United States Supreme Court as a *pro-se* litigant if "4 *pornographic pictures*" were *legitimately* found in McKenna's company email account?

There is only one answer: There never was "4 *pornographic pictures*" in McKenna's company email account. There are no "4 *pornographic pictures*" that exist anywhere on the record in this case. Nestle has not supported the "articulation by *counsel*" that "4 *pornographic pictures*" provided a basis supporting the termination of McKenna's employment. There is no basis in fact that McKenna's employment was terminated on the basis that "4 *pornographic pictures*" existed in McKenna's company email account.

At the time McKenna's employment was terminated, Nestle had *not* indicated to McKenna, that McKenna's employment had been terminated on any basis relating "4 *pornographic pictures*". Nestle's HR Manager had in *general terms* informed McKenna that McKenna's employment was terminated due to alleged violation of Nestle's Electronic Communications Policy (ECP) [141].

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[141] Kagenski Dep., p. 26, ll. 3-13; Id., p. 94, l. 23 to p. 95, l. 14; McKenna Dep., p. 100, l. 7 to p. 104, l. 6; Doc: 162-4 Filed: 01/26/09 Page: 20 of 43 PAGEID #: 3148 at Interrogatory No. 30

June 15, 2005 Nestle's HR Manager drafted an "Employer Statement" in response to McKenna's EEOC complaint [142]. Significantly the "Employer Statement" drafted by Nestle's *local* HR Manager with "first-hand knowledge" and who was *directly* involved in the decision to terminate McKenna's employment (Kagenski Dep., p. 201, ll. 1-5), does *not* reference any alleged "4 *pornographic pictures*"!

July 5, 2005 Nestle's in-house *legal counsel* who drafted Nestle's Position Statement to the EEOC *articulated* that Nestle relied on "• an email message containing 4 *pornographic pictures* of a male and a female in sexual positions, sent out from Nestle email;" [143].

March 7, 2006, Nestle's *legal counsel* reiterated: "The contents of Plaintiff's 'inbox' and 'sent items' folder included 4 *pornographic pictures* of a male and a female in sexual positions" [144].

March 31, 2008, in Nestle's MSJ Nestle's *legal counsel* alleges: "Plaintiff's termination had [...] everything to do with [...] sending and receiving *pornographic pictures*" [145], "Plaintiff's termination had nothing to do with any protected activity and everything to do with the fact that Plaintiff, an employee charged with overseeing Nestle's computer system, was sending and receiving *pornographic pictures* and emails on his company computer." [146].

The *articulations* within Kagenski and DeWitt's affidavits submitted in support of Nestle's

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[142] Doc: 162-6 Filed: 01/26/09 Pages: 59-68 of 77 PAGEIDs #: 3328-3337

[143] Doc: 136-9 Filed: 05/22/08 Page: 6 of 15 PAGEID #: 2491

[144] Doc: 18 Filed: 03/07/06 Page: 3 of 10 PAGEID #: 160 at FN #1

[145] Doc: 127 Filed: 03/31/08 [sealed] at page 11

[146] Doc: 127 Filed: 03/31/08 [sealed] at page 14

MSJ do *not* describe nor cite "4 *pornographic pictures*" were found in McKenna company emails as Nestle *attorneys* articulate [147]. Nestle's *legal counsel* articulated, "Plaintiff's termination was based on his violation of Nestlé's ECP by sending and receiving *pornographic* and sexually explicit emails" [148].

January 26, 2009, McKenna disputes that "*pornographic pictures*" exist on the Court record in support of the articulation by *legal counsel* by stating: "FACT: NO PORNOGRAPHY ever existed in McKenna's Outlook!" [149].

March 4, 2009, instead of tangible citation to an exhibit of "*pornographic pictures*", Nestle's *legal counsel again* "articulated":

> "Plaintiff instead attempts to argue that the emails cited by Nestle were not pornographic or sexually explicit. *Plaintiff's Motion*, p. 40. ***This is ridiculous!*** *Plaintiff does not consider anything pornographic or sexually explicit.*" (***emphasis*** added) [150].

March 31, 2009, in dismissing all McKenna's claims against Nestle, the District Court accepted Nestle's *articulation*: "In the course of investigating McKenna's Outlook folder, Nestle uncovered emails McKenna had sent containing *pornographic pictures* of a female friend and a male stripper in various sexual positions" [151]. "McKenna asserts that the proffered reason for his termination, violation of the ECP, has no basis in fact. *There is no legitimate*

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[147] Doc: 127 Filed: 03/31/08 [sealed] – "Exhibit A" ¶22(1), and "Exhibit C" ¶5 respectively

[148] Doc: 141 Filed: 06/03/08 Page: 2-3 of 8 PAGEID #: 2725-2726

[149] Doc: 162-1 Filed: 01/26/09 Page: 46-48 of 71 PAGEID #: 3038-3040

[150] Doc: 165 Filed: 03/04/09 Page: 16 of 38 PAGEID #: 3880 at ¶3

dispute that McKenna violated the ECP by, "Accessing, sending, forwarding, downloading, printing, or deliberate receipt of: *pornographic*, obscene, indecent or other sexually explicit materials" [152].

June 25, 2009 McKenna's appeal *again* raised no "*pornographic pictures*" exist anywhere on the record supporting the "articulation by *legal counsel*" that has consistently reiterated that "*pornographic pictures*" provided a basis supporting the termination of McKenna's employment [153]

July 27, 2009, *again* instead of making citation any actual exhibit(s) of "*pornographic pictures*" on the record, Nestle's *legal counsel again* "articulated" that now "Reasonable Minds Could Only Conclude" supports that 4 *pornographic pictures* existed in McKenna's company email [154].

December 23, 2009, the Court of Appeals still *accepts* Nestle's unsupported "articulation" that McKenna's employment was terminated on the basis of "sexually explicit photos" [155].

IV. The "Right to be Heard"

c. Summary Judgment standard

This Petition demonstrates only several of the genuine disputes that remain unresolved. Disputes remain to such an extent it has mandated formal complaints by a non-moving *pro-se* litigant of "Fraud

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[151] Doc: 168 Filed: 03/31/09 Page: 3-4 of 22 PAGEID #: 3974-3975 **(Appendix p.4 at ll. 10-14)**

[152] Doc: 168 Filed: 03/31/09 Page: 11 of 22 PAGEID #: 3982 **(Appendix p.10 at ll. 16-19)**

[153] Doc: 00615599546 Filed: 06/25/2009- Pages: 64-66

[154] Doc: 00615621584 Filed: 07/27/2009 Page: 24 at section "A."

[155] Doc: 00618042195 - Filed: 12/23/2009 - Page: 4 **(Appendix p.32 at ¶2)**

on the Court", subornation of fraud, perjury and evidence tampering have been filed with the lower courts. All of these unresolved disputes and resulting inferences have *liberally construed favorably* to the *moving* party!

To be Clear: **McKenna only stipulates to the NAMES in this case are correct**. There are *innumerable* disputes that *cannot* be raised by the sheer volume of those issues, and limitations on petition size. McKenna does NOT stipulate to for instance, but not limited to; *alleged* "relationships", *non-existent* evidence, events, dates, job-title(s)/ description(s) and/or position(s) to name only a few. This Court has stated directly within the employment discrimination context:

> "The court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." (internal citations and quotations omitted) *Reeves v. Sanderson*

Plumbing Products, Inc., 530 U. S. 133, 150-151 (2000).

Clearly summary judgment is untenable in absence of *stipulation* of facts, let alone to rise the shadow of complaints "Fraud on the Court", subornation of fraud, perjury and evidence tampering against the *moving* party!

i. **The Problem: The Absence of Party Stipulation(s)**

Had a stipulation been in place *prior* to summary judgment in this case, this calamity would *easily* have been averted. However, that same perversion now presents this Court with the opportunity not just to cure the injustice in this case; this Court has a opportunity to substantially affect *enforcement* of Congressional policy "of the highest priority" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S.Ct. 2024, 2030, 64 L.Ed.2d 723 (1980), *Fogerty v. Fantasy, Inc.*, 510 U.S. 523, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (both citing *Christiansburg Garment Co. v. EEOC*, 434 U. S. 417 (1978).

If it were *well-settled* law in all employment discrimination cases that a plaintiff, particularly in cases of *pro-se* plaintiffs; would be *lawfully* entitled to full *opportunity* to enter into a stipulation of facts and claims before summary judgment before the Courts, it would provide strong incentive, shifting the burden to employers to draft *responsible* policies requiring employee *stipulations* regarding all *potential* employment discrimination issues. For instance:

• Provides *strong incentive* that *all* employee terminations procure a *stipulation* that an employee's termination is unrelated to any *internal* employment discrimination issues.

• With responsibility justly shifted to the employer: The workload upon *overburdened* employment discrimination Administrative agencies would substantially be reduced.

> • With reduced workload: Administrative agencies would be cast into Congress's intended role in determining whether unlawful employment has occurred, based upon a readily available *stipulation* of facts.
> • Eliminate Administrative agencies being cast into the role of "Fact-Finder".

• With more effective Administrative agencies; The influx and workload of employment discrimination cases into the Courts would be substantially reduced.

> • The Courts would be more efficient in the just adjudication of summary judgment in inherently fact intensive employment discrimination cases, based upon a readily available *stipulation* of facts.
> • Eliminate the Courts from unlawfully being cast into the role of "Fact-Finder" wasting resources in resolving every dispute of fact between the parities, which lawfully is a function of a jury.
> • Eliminate employer's *perverse incentive* to exploit judiciary machinery as an instrument to defeat the important congressional policy against discriminatory employment practices

ii. The Solution: The Dlott "Standing Order", An Employment Discrimination Victim's "Right To Be Heard":

Susan J. Dlott, Chief Judge from the Southern District of Ohio (Judge Dlott), from which this case arises is the author of a "Standing Order Governing Civil Motions for Summary Judgment" (Standing Order) [156] provides a pragmatic basis for sweeping change in the enforcement of employment discrimination laws.

By this Court simply enacting law that in *all employment discrimination cases* that a plaintiff, particularly in case of *pro-se* plaintiff [157], would be *lawfully* entitled to *full opportunity* to enter into a *stipulation of facts and claims* **before** summary judgment before the Courts, patterned off Judge Dlott's Standing Order; this Court now has the opportunity to enact law to alter the landscape in enforcement of employment civil-rights statutes the law would be designed to enforce, which would arguably parallel the significance of Congressional employment discrimination statutes themselves.

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[156] http://www.ohsd.uscourts.gov/judges/dlott/Standard%20Order.pdf - **(Appendix pp.36-41)**

[157] "... in a situation in which a single poor, ignorant employee with a grievance, not a sling shot in his hand, faces a huge industrial employer in this modern day David and Goliath confrontation" *Penway v. American Cast Iron Pipe Company*, 411 F.2d 998 at 1005 (5th Cir. 1969).

REASONS FOR GRANTING

After a fair reading of facts and supporting arguments presented within this Petition, the reasons for granting this Petition should become self-evident.

I. Title VII Highest Priority

This court has on many occasions reiterated that a Title VII plaintiff is thee essential means to insure the Civil Rights Act of 1964 works, "Congress has cast the Title VII plaintiff in the role of 'a private attorney general' vindicating a policy 'of the highest priority,'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S.Ct. 2024, 2030, 64 L.Ed.2d 723 (1980), *Fogerty v. Fantasy, Inc.*, 510 U.S. 523, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (citing *Christiansburg Garment Co. v. EEOC*, 434 U. S. 417 (1978)). "[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices" *McKennon* at 358 (1995).

a. Critical Opportunity for Vindication of an Important Congressional Policy:

Whether enacted into law by the most appropriate Court in this land for such a critical law to vindicate an employment discrimination statute 'of the highest priority', or by Congressional amendment of employment discrimination statutes:

For reasons argued herein and the good of all citizens of the United States, it is *imperative* that law equivalent to the Dlott Standing Order secur-

ing an employment discrimination victim's "Right to be Heard", *must* be enacted.

However, it is only *this Court* that is now uniquely positioned to vindicate *both* harms imposed upon McKenna in this case *and* for the good of all citizens of the United States.

II. **The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court. Justice demands an exercise of this United States Supreme Court's supervisory power (S. Ct. R. 10(a)).**

b. **Lower Court Disregard for *McKennon*:**

> "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon* at 362-63.

Nestle's dispositive pleading and the subsequent lower Courts' judgments are egregiously tainted with "After Acquired Evidence" (e.g. "*Goss Depo. Tr. ...*", etc.).

c. **Lower Court Disregard for *Harris* ("Totality of Circumstances")**

> "[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its

> severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, ___, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. at 2283 (1998).

Nestle's misrepresentation of McKenna's legitimate claims and the lower Courts' disregard of McKenna's Supervisory *and* Co-worker Retaliatory Harassment claims when viewed within the requisite "totality of circumstances", makes the dismissal of *any* claims against Nestle untenable.

d. "Attorney Misconduct"/"Fraud on the Court"

"The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment. See *Chambers*, 501 U.S. at 43-45, 111 S.Ct. at 2132-33; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66, 100 S.Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118-19 (1st Cir. 1989); *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir.1982)." *Shepherd v. American Broadcasting Companies, Inc.*, 62 F. 3d 1469 – 1475 (DC Cir. 1995).

i. Case in Chief:

Ample evidence of attorney *and* party misconduct is now before this Court in a matter "of the highest priority" (*Fogerty at* 523), that is clearly sufficient to support entering default judgment against Nestle.

Alternatively, by refusing to remand this case back to the District court pending final resolution of all McKenna's complaints of "Attorney Misconduct" presently filed with the lower Courts, this Court would effectively raise the bar from: facts and inferences being *liberally* construed favorably to McKenna, to McKenna bearing a "clear and convincing" burden in an attempt to vindicate an "important congressional policy against discriminatory employment practices" *McKennon* at 358 (1995).

ii. Related Case:

Beyond the "Attorney Misconduct" referenced within this Petition. Other perverse acts of "Attorney Misconduct" which occurred during the course of these proceedings have been referenced within **Petition 10-21**, "Aug 18 2010 DISTRIBUTED for Conference of September 27, 2010".

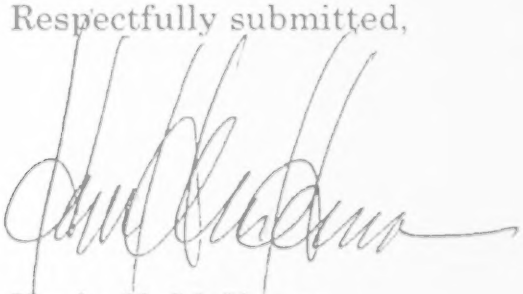
e. Lower Court Disregard for Summary Judgment Standards

Clearly summary judgment is untenable in absence of *stipulation* of facts, let alone rise to the level of complaints "Fraud on the Court", subornation of fraud, perjury and evidence tampering *against* the *moving* party!

CONCLUSION

For the above reasons, as Justice demands, and for any other reason(s) this Court may deem appropriate when *liberally* construed most favorably to the Petitioner *pro-se*, a writ of certiorari is appropriate to review the order of United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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170

(2)

Supreme Court, U.S.
FILED

No. _____ 10-318 AUG 26 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

APPENDIX

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August 23, 2010

TABLE OF CONTENTS
(Appendix)

Page

District Court Opinion and Order.....1

Circuit Court Order 28

Circuit Court Denial of Rehearing.....35

Dlott – Standing Order Governing Civil Motions For Summary Judgment 36

Dlott – Exhibit A.....39

2004 – Nestle Termination Memo to McKenna.....42

ORDER: Section IX – Protective Order
Section X – Amend Complaint 43

United States District Court,
Southern District of Ohio, Eastern Division.
UNPUBLISHED

KEVIN H. McKENNA,

Plaintiff,

v.

NESTLE PURINA PETCARE CO.,

Defendant.

Case No. C2-05-976.

March 31, 2009.

OPINION AND ORDER

ALGENON L. MARBLEY, District Judge.
MARK ABEL. Magistrate Judge.

I. INTRODUCTION

This matter is before the Court on Defendant's and Plaintiff's Cross Motions for Summary Judgment. Plaintiff Kevin McKenna ("McKenna") sued Nestle Purina Petcare ("Nestle"), his former employer, asserting a claim for retaliatory termination and a claim for sexual harassment. Nestle also filed Motion to Strike exhibits attached to McKenna's Motion for Summary Judgment. For the reasons stated below, the Court **DENIES** Nestle's Motion to Strike, **GRANTS** Nestle's Motion for Summary Judgment, and **DENIES** McKenna's Motion for Summary Judgment.

II. BACKGROUND

A. Factual Background

McKenna worked for Nestle in Zanesville, Ohio as an Information Systems Technician from October 2001 until his termination on October 14,

2004. His job duties included overseeing Nestle's computer system, and assisting Nestle employees with their IT maintenance issues. All Nestle employees, including McKenna, were expected to be familiar with and abide by Nestle's Electronic Communications Policy ("ECP").

In early October 2002, McKenna began making verbal and email advances towards a female co-worker, Nancy Goss ("Goss"). Initially, these advances were rebuffed by Goss. Goss made it clear to McKenna that she was not interested in commencing a sexual relationship.[1] Undeterred by her refusal, McKenna continued to make advances towards Goss. Goss reported McKenna's behavior to her supervisor, Dante Benincasa. Ultimately, McKenna was written up for violating Nestle's sexual harassment policy.

In spite of these incidents, McKenna and Goss's working relationship evolved into a consensual, sexual relationship in October 2003, which lasted until July 2004. The relationship began with sexually explicit email exchanges and eventually led to sexual encounters between the two of them, both in and out of the workplace. Throughout their sexual relationship, Goss received sexually explicit emails from McKenna on a regular basis. Before the relationship with Goss, McKenna had been involved in a sexual relationship with another Nestle co-worker, Lisa Ellis ("Ellis"). During McKenna's relationship with Goss, he informed Goss of his previous relationship with Ellis, which led to Goss, Ellis, and McKenna participating in sexual trysts with each other.

The relationship between Goss and McKenna deteriorated, and in July 2004, Goss ended the

relationship due to McKenna's demonstrated interest in other employees at Nestle, particularly Ellis. One month after ending the relationship, Goss sent McKenna and Ellis an email requesting that they keep any sexual relationship between the two of them out of the office. Shortly thereafter, on August 31, 2004, McKenna met with his immediate supervisor, Carol Kagenski ("Kagenski"), and complained about Goss's changed, more hostile, demeanor towards him. McKenna verbally requested Kagenski not take any action based on his conversation with her, and again reiterated this request in writing on September 1. (*Letter to Nestle*, Sept. 1, 2004). After complaining about Goss's behavior, McKenna admits that Goss made no further threats, offensive remarks, or sexual advances towards him.

Goss, meanwhile, met with Kagenski and another Nestle supervisor, Mitzi Link ("Link"), at Link's condo to discuss the nature of her relationship with McKenna. She told both supervisors about what had happened between her and McKenna, and why the events would lead to her occasionally crying and making mistakes at work. Goss also provided Kagenski with emails between her and McKenna from their private email accounts, and told Kagenski that she believed McKenna was accessing her work computer. After meeting with Goss, and based on emails provided by Goss, Kagenski concluded that Goss and McKenna's situation was merely a common post-breakup dispute. Kagenski determined that the best course of action was to monitor both McKenna and Goss.

In September 2004, Goss sent a hostile and threatening letter to Ellis at her home expressing her

aversion towards Ellis and McKenna's relationship. Ellis informed Link of this incident, after which Link contacted Kagenski. On October 1, after Kagenski interviewed Ellis and Goss regarding the letter, Nestle suspended Goss, pending the outcome of an investigation into the letter. The investigation of the letter led Nestle's Information Security Department to review the Outlook folders of Goss, Ellis, and McKenna because all three individuals had been discussed in Goss's letter. In the course of investigating McKenna's Outlook folder, Nestle uncovered emails McKenna had sent containing pornographic pictures of a female friend and a male stripper in various sexual positions. The investigation also uncovered emails with sexually explicit language that had been sent during work hours to Goss, another woman named Tammy Sparks, and his wife. [2]

In October 2004, after the investigation was complete, Nestle terminated Goss for overtly threatening a co-worker (based on the contents of the letter sent by Goss to Ellis). Nestle also terminated McKenna for violating its ECP. Nestle suspended Ellis for three days and placed her on an Action Plan after it was discovered by Nestle that she spent an inordinate amount of time sending personal email messages during work hours, none of which were sexual in nature.

B. Procedural Background

McKenna filed a discrimination charge with the EEOC on April 4, 2005, which was dismissed based on the EEOC's finding that no probable cause existed to support that discrimination had occurred. McKenna filed a retaliatory termination and sexual

harassment claim against Nestle on October 25, 2005, approximately one year after he was terminated. McKenna alleges that Goss harassed him, that he complained of the harassment, and that he suffered retaliation for complaining of the harassment. In his Motion for Summary Judgment, filed January 26, 2009, McKenna also appears to assert a sex discrimination claim based on disparate treatment against. Nestle and McKenna now both move for summary judgment on all of McKenna's claims.

III. STANDARD OF REVIEW

Summary judgment is proper if "there is no genuine issue as to any material fact [such that] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). But "summary judgment will not lie if the...evidence is such that a reasonable party could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the court must construe the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986.) The movant therefore has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F. 3d 1382, 1388-89 (6th Cir. 1993). But the non-moving party "may not rest upon its mere allegations." Fed. R. Civ. P. 56 (e); see *Celotex*, 477 U.S. at 324; *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). The non-moving party must present "significant probative evidence" to show that there is more than "some

metaphysical doubt as to the material facts." Moore v. Philip Morris Co., 8 F.3d 335, 339-40 (6th Cir. 1993).

The standard of review for cross-motions of summary judgment does not differ from the standard applied when a motion is filed by only one party to the litigation. *Taft Broad. Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991). Furthermore,

> [t]he fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts. Rather, the court must evaluate each party's motion on its own merits....

Id. (citations omitted).

IV. LAW & ANALYSIS

A. Motion to Strike

Nestle moved to strike specific pages from the exhibits attached to McKenna's Response in Opposition to Defendant's Motion for Summary Judgment. The ground for Nestle's motion is that McKenna failed to authenticate any of the documents attached as exhibits to the Response in Opposition. Pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings. *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999); see *Duncan v. Village of Middlefield*, No. 93-3818, 1994 WL 269578 (6th Cir. June 17, 1994) ("pro see plaintiffs are to be accorded a measure of leniency.") In addition "the formalities of the Federal Rules of Civil Procedure are to be applied less stringently

against pro se litigants than against lawyers." *Oasis Corp. v. Judd*, 132 F.Supp.2d 612, 616 (S.D. Ohio 2001), citing see *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Due to McKenna's pro se status, this Court finds his exhibits should not be stricken due to failure to authenticate. Nestle's Motion to Strike is thereby DENIED.

B. Retaliation

Title VII provides that:

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter [("the opposition clause"], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [("the participation clause")].

42 U.S.C. § 2000e-3(a). McKenna alleges that his termination by Nestle was in retaliation for complaining about Goss's sexual harassment.

McKenna must first establish a prima facie case of retaliation. See *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987). The burden then shifts to Nestle "to articulate some legitimate, nondiscriminatory reason" for its actions. See *Wrenn*, 808 F.2d 493 at 501. If Nestle carries this burden, McKenna must then prove by a preponderance of the evidence that the reason offered by Nestle was a pretext for discrimination. See *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "Disputation of the facts underlying [Nestle's] legitimate business

reason . . . is not sufficient to carry [McKenna's] burden"; rather, McKenna must present evidence to show that the reason given is an attempt to cover up the real discriminatory motive. See *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987).

1. Prima Facie Case of Retaliation

To establish a prima facie case of retaliation, McKenna must demonstrate by a preponderance of evidence the following four elements: (1) McKenna engaged in legally protected activity; (2) Nestle knew about McKenna's exercise of this right; (3) Nestle took an employment action adverse to McKenna; and (4) the protected activity and the adverse employment action are causally connected. See *Wrenn*, 808 F.2d 493 at 500; *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003).

For the first element, McKenna asserts that his complaint to Kagenski about Goss functions as a protected activity because it constitutes opposition under the meaning of the opposition clause. The Sixth Circuit has enumerated the types of activities that constitute opposition under Title VII:

> [C]omplaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer — e.g., former employers, union, and co-workers.

Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000). This Court finds that McKenna's act of complaining to Kagenski on August 31, 2004, prior

to Nestle's internal investigation, constitutes the kind of overt opposition that the Sixth Circuit has held is protected under Title VII. For the second element, it is obvious Nestle was aware of McKenna's complaint on August 31, 2004. For the third element, Nestle's termination of McKenna's employment constitutes adverse employment action.

The fourth element, that the protected activity and the adverse employment action are causally connected, however, has not been satisfied. "To establish a causal connection, a Defendant must proffer evidence sufficient to raise the inference that her protected activity was the likely reasons for the adverse action." *Dixon v. Gonzales*, 481 F.3d 324, 333 (6th Cir. 2007). McKenna asserts that the timing of his termination on October 14, 2004 was causally connected to his numerous complaints of sexual harassment. At his deposition he testified regarding the reason for the retaliation complaint:

> Q: I'm asking you for what evidence you have that Nestle retaliated against you for your complaint against Nancy Goss?
> A. That my employment was terminated probably within close to about 30 days, and I have no other evidence of anything unsatisfactory about my work performance prior to that.

(*McKenna Depo. Tr.* at p. 325). McKenna offers no evidence of retaliation other than temporal proximity. For Title VII retaliation claims "temporal proximity itself is insufficient to find a causal connection . . ." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 596 (6th Cir. 2007). This Court

finds, therefore, that McKenna has not established a causal connection existed between his complaint and his termination. Because McKenna fails to establish the fourth element, McKenna cannot make out a prima facie case of retaliation.

2. Legitimate Nondiscriminatory Reason

Assuming arguendo that McKenna had established a prima facie case of retaliation, the burden would shift to Nestle "to articulate some legitimate, nondiscriminatory reason" for its actions. See *Wrenn*, 808 F.2d 493 at 501. The Court finds that Nestle had a legitimate, nondiscriminatory reason for terminating McKenna—violation of its ECP. Nestle's ECP specifically states that prohibited computing activities include, but are not limited to: "Accessing, sending, forwarding, downloading, printing, or deliberate receipt of: pornographic, obscene, indecent or other sexually explicit materials." (Electronic Communications Policy at p. 4). Nestle's internal investigation of McKenna's computer activities uncovered that McKenna used his Nestle computer to send sexually explicit emails to Goss and several other persons, and stored sexually explicit pictures on his computer, which were subsequently sent to his wife from his Nestle email account.[3]

McKenna even admitted that he violated the ECP. McKenna stated, "...I KNOW that I have violated the Electronic Communications Policy, I'd never in my wildest dreams even think of challenging that fact, I don't feel as though I have ever tried to represent myself in any other way in regards to that." (*Email to Nestle, October 18, 2004*). Furthermore, McKenna was aware that the violation

of the ECP could potentially lead to his termination. He admitted, "...I very full and well know I was/am in violation of the company's Electronic Communications Policy...[and] am/was full aware of the potential consequences (including possible termination)." (*Id.*)

McKenna's only refutation to Nestle's legitimate, nondiscriminatory reason for terminating him is that the evidence against him is inadmissible and not authentic. McKenna insists that evidence of the sexually explicit documents contained within McKenna's Outlook account is inadmissible because it no longer exists. As part of Nestle's investigation of McKenna, Goss, and Ellis, the Information Security Department reviewed the email Outlook folders of all three employees, and uncovered the sexually explicit documents in McKenna's email account. McKenna claims that since Nestle "destroyed" his Outlook account upon his termination, the sexually explicit documents that the Information Security Department printed off are inadmissible against him as evidence that he violated the ECP.

Under the Federal Rules of Evidence, Rule 1004, the Admissibility of Other Evidence of Contents states:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

> (2) Original not obtainable. No original can be obtained by any available judicial process or procedure.

McKenna's Outlook account was destroyed, but there has been no allegation that this was done in bad faith. Furthermore, even though the account was destroyed, the original print outs of the emails are available. For these reasons, this Court finds McKenna's argument that the documents procured from his Outlook are inadmissible has no legal merit. Nestle has sufficiently established a legitimate, nondiscriminatory reason for terminating McKenna— violation of its ECP.

3. Pretext

Assuming arguendo that McKenna had established a prima facie case, because Nestle has established a legitimate, nondiscriminatory reason for terminating McKenna, the burden of production would once again shift back to McKenna to demonstrate, by a preponderance of the evidence, that this proffered reason is pretext for discrimination. See *Wrenn,* 808 F.2d 493 at 501. There are three ways to demonstrate pretext: (1) that the proffered reason has no basis in fact; (2) that the proffered reason did not actually motivate the termination; or (3) that the proffered reason was insufficient to motivate discharge. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

McKenna asserts that the proffered reason for his termination, violation of the ECP, has no basis in fact. There is no legitimate dispute that McKenna violated the ECP by, "Accessing, sending, forwarding, downloading, printing, or deliberate

receipt of: pornographic, obscene, indecent or other sexually explicit materials" on his work computer. (See Electronic Communications Policy at p. 4.) McKenna's assertion that words such as "cunt" may only be vulgar depending on the context with which they are used is plainly unmeritorious. (See McKenna Depo. Tr. at p. 114.) Although McKenna may not consider a word like "cunt" to be vulgar or profane, its common construction is a word that is vulgar and profane. Merriam-Webster defines the word as:

> 1) *usually obscene*: the female genital organs; also: sexual intercourse with a woman;
> 2) *usually disparaging and obscene*.

(*Merriam-Webster Online Dictionary*, 2009 (March 31, 2009), *available at* http://www.merriam-webster.com/dictionary/cunt). Encarta defines the word as:

> 1) a highly offensive term for a woman's genitals (*taboo*);
> 2) a highly offensive term for a woman (*taboo*)
> 3) a highly offensive term for somebody who is viewed with great dislike or contempt, especially a man (*taboo insult*)
> 4) a highly offensive term for sexual intercourse with a woman (*taboo*).

(*Encarta World English Dictionary*, 2009 (March 31, 2009), *available at* http://encarta.msn.com/ dictionary _1861601919/definition/html). McKenna also contends that he does not see sex as a taboo topic to be discussed over work emails. (*Id.* at p. 31.)[4] Although McKenna may personally feel he is free to discuss whatever he wants at work, any reasonable

person would recognize that sex is a taboo topic that should not be discussed over work emails. The Court finds that Nestle clearly has a basis in fact for determining that McKenna's emails were obscene and sexually explicit in nature, and thereby violated the ECP.

McKenna also asserts that the proffered reason for terminating him did not actually motivate the discharge; rather, he asserts he was terminated for complaining about sexual harassment. There is no evidence, other than temporal proximity, to suggest that the reason McKenna was fired was due to his complaint to Kagenski about Goss. As already stated, "temporal proximity itself is insufficient to find a causal connection . . ." *Michael*, 496 F.3d at 596. Furthermore, the Court finds that the evidence supports that the motivation for McKenna's discharge was his violation of the ECP.

McKenna finally asserts that Nestle's proffered reason for terminating him was insufficient to motivate his discharge. McKenna asserts that Nestle has never discharged another employee for violating the ECP, and that the majority of employees also violate the ECP. He also asserts that Ellis also violated the ECP, but she was not terminated. He contends these two facts establish that violation of the ECP is an insufficient reason for discharging an employee. Both of McKenna's assertions fail to establish that violation of the ECP was insufficient to motivate discharge.

First, McKenna does not assert that any other employee has ever violated the ECP by sending sexually explicit emails, or that any other employee was not terminated for sending sexually explicit emails. Many employees presumably violate the ECP

in some way (i.e., spending too much time at work sending personal emails); but this type of ECP violation differs from a violation in which someone is sending sexually explicit emails from his work computer laced with obscene language and pornographic pictures. McKenna has not shown that Nestle has not or would not terminate another employee for a violation of the ECP in the way he has violated the ECP. The fact that Nestle has never discharged another employee for violating the ECP does not establish that McKenna's violation of the ECP is an insufficient reason to motivate discharge.

Second, McKenna cannot establish pretext by asserting that he was treated less favorably than Ellis, because she was not a similarly situated employee. To be "similarly situated" the individual with whom the plaintiff seeks to compare his treatment

> must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Jackson v. FedEx Corp. Servs., Inc., 518 F.3d 388, 393 (6th Cir. 2008) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 383 (6th Cir. 1992)). Although Ellis was subject to the same ECP as McKenna (as were all Nestle employees), Ellis did not deal with the same supervisor as McKenna, nor did they share the same position or job duties (she was an accounting clerk, and McKenna was an Information Systems Technician in charge of Nestle's computer system

and internet). More significantly, Ellis did not engage in the same conduct as McKenna. Ellis received a Final Written Warning for violating Nestle's ECP, but Ellis' violations were for excessive use of emails, not for sending and receiving sexually explicit emails. (*Kagenski Affidavit* at pp. 5-6.) Therefore, the fact that Ellis violated the ECP, but was not terminated, does not demonstrate that a similarly situated, non-protected employee was treated more favorably.

Because McKenna has failed to show a causal connection, which is required to establish a prima facie case, and because McKenna further has failed to establish Nestle's legitimate nondiscriminatory reason was pretextual, this Court hereby **GRANTS** Nestle's Motion for Summary Judgment on the retaliatory termination claim, and **DENIES** McKenna's Motion for Summary Judgment on that claim.

C. Sexual Harrassment

McKenna also asserts a sexual harassment claim against Nestle. To establish a prima facie case for sexual harassment, McKenna must demonstrate: (1) he was a member of a protected class; (2) he was the subject of unwelcome harassment; (3) the harassment was based on sex; (4) the harassment unreasonably interfered with McKenna's work performance or created a hostile or offensive work environment that was severe and pervasive; and (5) the employer knew, or should have known, of the harassment and failed unreasonably to take prompt and appropriate corrective action. *Williams v. General Motors Corp.*, 197 F.3d 553, 560-61 (6th Cir. 1999).

McKenna contends that actions taken by Goss and Ellis constituted sexual harassment. McKenna fails to show, however, that any actions taken by Goss which McKenna asserts were harassing were "based on sex." McKenna furthermore fails to show that any actions taken by Goss or Ellis created a hostile or offensive work environment. Finally, McKenna fails to show that Nestle knew or should have known of the harassment and failed to take appropriate action.

For the third prong, McKenna has not shown that any actions taken by Goss were "based on sex." "Harassment" in the sexual harassment context is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Greenwood v. Delphi Auto. Sys., Inc.*, 257 F. Supp. 2d 1047, 1059 (S.D. Ohio 2003). "To be of a sexual nature, verbal conduct must be gender related." *Id.* If the conduct is "simply abusive, with no sexual element," that is not harassment because of the plaintiff's sex. *Id.* As the Sixth Circuit noted in *Rothenbusch v. Ford Motor Comp.*, No. 93-3945, 1995 WL 431012 (6th Cir. July 20, 1995),

> To show that the alleged harassment was based on sex, Plaintiff must prove by a preponderance of the legal evidence that but for the fact of her sex, she would not have been the object of unlawful harassment. Harassment is prohibited by ***Ohio law*** only if it is based on being male or female. ***Personal animosity is not the equivalent of sexual harassment and is not proscribed by law.*** *Id.* at *3 (emphasis added).

McKenna and Goss maintained a consensual, sexual relationship for approximately eleven months. Goss ended her relationship with McKenna on July 28, 2004. McKenna testified that Goss made no advances or sexual remarks to him between July 28, 2004 and October 1, 2004, the date of Goss's suspension. (*McKenna Depo Tr.* at p. 258-59.) McKenna could only make the vague comment that she made his life "hell." (*Id.* at p. 239.) McKenna has produced no evidence that any alleged harassment from Goss was based on sex. Instead, the evidence establishes that Goss's cantankerous behavior towards McKenna was not based on his status as a male, but based on his status as someone with whom she was ro[redacted]tically involved. Goss treated Ellis, a female, as adversely as McKenna, because Goss believed McKenna and Ellis were ro[redacted]tically involved. (*McKenna Depo. Tr.* at p. 343; *Goss Depo Tr.* at p. 36.) Thus, Goss's behavior can be described merely as "personal animosity," which is not the equivalent of sexual harassment.

For the fourth prong, McKenna has not shown that he was subjected to a hostile or offensive work environment that was severe and pervasive. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive `to alter the condition of [the victim's] employment and create an abusive working environment.'" *Id.* at 67; see *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986). In determining whether a plaintiff has met this burden, this Court must consider a reasonable person's reaction to a similar environment under like circumstances. *Rabidue*, 805 F.2d at 620.

Taking all of McKenna's allegations as true, Goss's conduct simply does not rise to the level required to be actionable under Title VII. McKenna testified that there was no one specific act to describe Goss's actions as hostile or abusive, and that it was just her demeanor post-breakup. (See *McKenna Depo. Tr.* at p. 153) ("[t]here is no one specific act. It was just her demeanor in every way, shape and form"). He also admitted that Goss did not make any threats or demands, lewd or offensive remarks, sexual advances, or threatening phone calls. (*Id.* at p. 263.)

Taking all of McKenna's allegations as true, McKenna also has not established that the "Rope Joke" email made by Ellis, which he contends was "male bashing" rises to the level to be actionable under Title VII. Ellis's "Rope Joke" email can be characterized as more akin to "simple teasing, offhand comments, and isolated incidents," rather than "discriminatory intimidation, ridicule, and insult" sufficiently serious to have altered the conditions of McKenna's employment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). No reasonable person would view the actions of Goss or Ellis as subjecting him to a hostile or offensive work environment that was severe and pervasive.[5]

Finally, for the fifth prong, McKenna has not established that Nestle knew, or should have known, of any harassment and failed unreasonably to take prompt and appropriate corrective action. This Court finds that Kagenski did not unreasonably fail to take appropriate corrective action with respect to McKenna's complaint about Goss's behavior. Indeed, once McKenna voiced concerns to Kagenski about Goss's behavior, she determined the best course of

action was to monitor the situation. (*Kagenski Affidavit* at 13.) Further, McKenna acknowledges he requested no action be taken by Kagenski and followed up this verbal request with a written request that no action be taken as a result of McKenna's conversation with Kagenski. (*McKenna Depo. Tr.* at pp. 158, 160, and Kagenski Affidvit at 12.) The written request stated, in relevant part:

> Carol I had come to you on Tuesday, August 31st 2004 strictly, explicitly and only to have casual, "off the record" type of conversation, so that an impartial person be aware of something that could potentially become an issue. It is not, and was not my intent to file a complaint or take any sort of "Action" in regards to the matter. . . . [I am] thereby formally documenting [my] wish that NO ACTION be taken at this time, and thereby formally documenting why the company did not take action in the matter when they were made aware that the situation existed. . . . It is with this document, that I am making it formally known that it is my (emphatic) wish that there be absolutely NO ACTION taken by the company in any way shape or form regarding this matter at this time.

(*Letter from McKenna to Link, Sept. 1, 2004.*) McKenna cannot now assert that Kagenski failed to take appropriate action when McKenna specifically requested she not take any action.

This Court also finds that Link did not unreasonably fail to take appropriate corrective action with respect to McKenna's complaint about Ellis's "Rope Email." McKenna asserts that when he

went to complain to Link, she stated, "Ya well, when you get burned a few times like we have, you get a bad attitude" and did not discipline Ellis (Plaintiff's Motion at pp. 13-14.) The evidence establishes, however, that McKenna requested that no action be taken by Link for the email sent by Ellis. McKenna sent an email to Link stating, "I debated over an entire weekend on how best to handle the [email sent by Ellis] and decided for harmony's sake it was a better choice to let it blow over peacefully." (Email to Link at p. 44.) McKenna cannot now assert that Link's failure to discipline Ellis for the email, for which McKenna specifically requested she not discipline Ellis, was a failure of Nestle to take appropriate action.

Because McKenna has failed to establish several of the prongs for a prima facie case for sexual harassment, Nestle's Motion for Summary Judgment on the claim for sexual harassment is **GRANTED**, and McKenna's Motion for Summary Judgment on that claim is **DENIED**.

D. Sex Discrimination

Although never addressed in his Complaint, or in his multiple opportunities to amend his Complaint, McKenna, for the first time, appears to assert a claim of sex discrimination based on disparate treatment in his Motion for Summary Judgment. Even if this Court entertains McKenna's allegation of sex discrimination, he fails to demonstrate a prima facie case.

A plaintiff in a Title VII disparate treatment case may prove discriminatory intent in one of two ways. First, a plaintiff may present "credible, direct evidence of discriminatory animus." *Terbovitz v.*

Fiscal Court, 825 F.2d 111, 115 (6th Cir. 1987). Direct evidence is that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Johnson v. The Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003) (citations omitted). Moreover, direct evidence requires that the fact finder cannot "draw any inferences in order to conclude the challenged employment action was motivated at least in part by prejudice .. . " *Id.* Because of this, it is the "rare situation when direct evidence is readily available." *Kline v. TVA*, 128 F.3d 337, 348 (6th Cir. 1997).

A plaintiff may also establish discriminatory intent without direct evidence under the three-part framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248 (1981). If the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the decision. *Burdine*, 450 U.S. at 253-54. If the employer meets its burden of production, the plaintiff can still prevail by showing that the proffered reason is a pretext for discrimination. *Id.* at 256.

McKenna contends that he has evidence that constitutes direct evidence of discriminatory intent. This Court finds that the record is devoid of evidence that requires the conclusion that unlawful discrimination was at least a motivating factor in his termination. Since McKenna failed to present direct evidence of discriminatory intent, his claim is analyzed under the test outlined in *McDonnell Douglas* and *Burdine*.

To establish a prima facie case of gender discrimination under Title VII, McKenna must demonstrate that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) he was qualified for the position; (4) he was replaced by a person outside the protected class, or treated differently than similarly situated non-protected employees. *McDonnell Douglas*, 411 U.S. 792 at 802; *Burdine*, 450 U.S. 248 at 248; *Vincent v. Brewer Co.*, 514 F.3d 489, 494 (6th Cir. 2007).

As to the second prong, there are two different actions that McKenna asserts constitute an adverse employment action. The first action is that Goss was granted an off-site meeting by Link, but that McKenna was not granted the same off-site meeting. The second action is McKenna's termination.

McKenna argues that when Link held an off-site meeting at her condo with Goss, and Kagenski, but refused to hold such an off-site meeting with McKenna, that amounted to an adverse employment action. McKenna asserts that the "clandestine" meeting which occurred between Link, Goss, and Kagenski, but not with McKenna, is evidence demonstrating Link's predisposition to discriminate against McKenna. McKenna's assertion that there was discrimination because Link met with Goss, a female, but not with McKenna, a male, is without legal basis. An adverse employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008) (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1999)). An off-site meeting

between three female co-workers clearly does not constitute an adverse employment action.[6]

McKenna's termination constitutes an adverse employment action. McKenna, nevertheless, cannot establish the fourth prong of the prima facie case because he cannot demonstrate that he was treated differently than a similarly situated employee with respect to the termination action. McKenna complains that Ellis was not terminated for her violation of the ECP, but he was terminated, so he was treated differently. As already analyzed by this Court, Ellis was not "similarly situated" to McKenna because she did not deal with the same supervisor as McKenna, nor did they share the same position or job duties (she was an accounting clerk, and McKenna was an Information Systems Technician). More significantly, Ellis did not engage in the same conduct as McKenna. Ellis received a Final Written Warning for violating Nestle's ECP, but Ellis' violations were for excessive use of emails, not for sending and receiving sexually explicit emails. (*Kagenski Affidavit* at pp. 5-6.) "[I]t is the discrimination plaintiff's burden to establish that the other employee's acts were of `comparable seriousness' to his or her own infraction." *Summerville v. Ross/Abbot Labs*, No. 98-3517, 1999 WL 623786, at *19 (6th Cir. Aug. 10, 1999) (quoting *Mitchell*, 964 F.2d 577 at 583). Thus, McKenna cannot demonstrate a similarly situated, non-protected employee was treated differently than McKenna.

Because McKenna cannot establish the fourth prong of the prima facie case for sex discrimination based on disparate treatment, Nestle's Motion for Summary Judgment on the claim for sex

discrimination is **GRANTED**, and McKenna's Motion for Summary Judgment on that claim is **DENIED**.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Nestle's Motion to Strike, **GRANTS** Nestle's Motion for Summary Judgment with respect to all of McKenna's claims, and **DENIES** McKenna's Motion for Summary Judgment with respect to all of McKenna's claims. This case is **DISMISSED**. All remaining pending motions are **MOOTED**.

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALEGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: March 31, 2009

[1] McKenna asserts that Goss was attracted to McKenna even before McKenna had even accepted employment with Nestle. Despite any initial attraction to McKenna, this Court finds McKenna's assertion to be immaterial to the events that later ensued. Sexual harassment can occur regardless of an initial attraction between the two parties prior to the commencement of the harassment.

[2] McKenna asserts that the emails he wrote did not contain sexual innuendo, and that Goss's interpretation is "delusional." This is not true. The emails that McKenna sent to Goss were clearly indecent and contained sexually explicit content. For instance, one of these emails included a description

of McKenna masturbating at work and ejaculating onto brownies. McKenna's assertion is unfounded.

[3] The following are some of the emails sent by McKenna from his work computer:

(1) "You'll be able to feel yourself contracting all over your hand, how wet, excited you are/get, how your cunt gushes from being HF'd . . . Mmm . . ." (Email to Tammy Sparks, Aug. 1, 2003)

(2) "Hmmmmm/Mmmmmm . . . found out something interesting . . . was sitting here a bit ago . . . *HAPPENED* to have my hand across my lap . . . started tapping my fingers . . . jeans were tight enough I could FEEL the tapping across my c#ck . . . felt GOOD, I could feel myself LIKING IT, Getting h#rd . . . I let my fingers get closer so I could feel the sensation better . . . MMMMM . . . MORE was better . . so I started PATTING it, ALMOST smacking it . . . LOVED IT!!!!!!!! WHEW!" (Email to Goss, June. 16, 2004)

(3) "I HAVE TO SAY ...when I'm "in the mood" ... Mitzi looks pretty damned good ... if she TRIED, she could be a real hottie..." (Email to Goss, July 8, 2004)

[4] McKenna admitted in his affidavit, attached to McKenna's Motion, in regards to his relationship and email communications with Goss,

[v]irtually all of the `candid adult/sexual' aspect of the relationship was by means of `erotic' or `fantasy' natured conversations through private email accounts. There were some (approximately a

`handful') sexually natured `events' between Goss and I, inspired by these erotic or fantasy natured email conversations which occurred over the duration of that relationship. (McKenna's Affidavit at p. 2, emphasis added).

[5] McKenna's Motion for Summary Judgment and Reply are not well organized, and it is often difficult for the Court to determine what actions he is complaining about for what claims. To the extent he complains about any actions of Link, this Court finds that no actions or statements of Link constitute sexual harassment. This is mainly because nothing she said or did could be considered severe or pervasive so as to create a hostile work environment.

[6] In addition, the record shows that McKenna's email to Link requesting an off-site meeting indicated that a conversation was not urgent (using words to describe the desired time of the meeting as "whenever, today, tomorrow, next week . . .") and even after Link's response to McKenna inviting him to meet the following week, McKenna's response continued to impress that meeting with Link was not critical ("it's 100% up to you . . . it's nothing URGENT"). (Email to Kagenski, Sept. 15, 2004.) McKenna gave no indication that his conversation was a pressing matter, yet faults Link for sex discrimination by not granting him an off-site meeting.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN H. MCKENNA,
Plaintiff-Appellant,

v.

NESTLE PURINA PETCARE COMPANY,
Defendant-Appellee.

On Appeal From The United States District Court
for the Southern District of Ohio

ORDER

Before: BOGGS, MOORE, and COOK,
Circuit Judges.

Kevin H. McKenna, an Ohio resident proceeding *pro se*, appeals a district court's judgment granting the defendant's motion for summary judgment, denying McKenna's motion for partial summary judgment, and dismissing McKenna's amended complaint. McKenna has also filed a motion to seal the defendant's appellate brief. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2005, McKenna filed a complaint against Nestle Purina PetCare Company ("Nestle") alleging

sexual harassment, gender discrimination, and retaliatory termination. McKenna sought compensatory and punitive damages. He later filed an amended complaint making the same allegations. Nestle filed a motion for summary judgment. McKenna filed a motion for partial summary judgment. The district court granted Nestle's motion, denied McKenna's motion, and entered a judgment dismissing McKenna's amended complaint.

On appeal, McKenna argues that the district court relied on erroneous facts and misapplied the standard applicable to summary judgment motions. We review the grant or denial of summary judgment de novo. *Yeschick v. Mineta*, 521 F.3d 498, 502 (6th Cir. 2008). Summary judgment is appropriate when the evidence presented shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). The moving party bears the burden of showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks and citation omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

McKenna first argues that Nestle knew that he was being sexually harassed and that it failed to

take appropriate corrective action. To prevail on a claim of co-worker sexual harassment, a plaintiff must prove that (1) he was subject to unwelcome sexual harassment; (2) the harassment was based on his gender; (3) the harassment created a hostile work environment; and (4) the defendant knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir 2008); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999). To establish a hostile work environment, "the plaintiff must show that the conduct in question was severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and that the victim subjectively regarded it as abusive." *Smith v. Leggett Wire Co.*, 220 F.3d 752, 760 (6th Cir. 2000).

McKenna fails to establish a prima facie case of sexual harassment. McKenna has not submitted any evidence showing that any action on the part of the alleged harassers was based on his gender. Instead, the evidence shows that the alleged harassers' actions toward McKenna were based on personal conflict resulting from the fact that McKenna had engaged in ro[redacted]tic relationships with them. McKenna has also not demonstrated that the actions of the alleged harassers were sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Thus, McKenna has not demonstrated that he was subjected to actionable sexual harassment.

McKenna also argues that Nestle terminated his employment because of his gender and in retaliation for his complaints of sexual harassment. To establish a prima facie case of retaliation, a plaintiff must establish that (1) he engaged in protected activity; (2) the employer knew of the exercise of the protected right; (3) the employer subsequently took an adverse employment action against the employee; and (4) a causal connection existed between the protected activity and the adverse employment action. *Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624, 639 (6th Cir. 2009); *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). To establish a prima facie case of gender discrimination, a plaintiff must show that (1) he is a member of a protected group; (2) he was subjected to an adverse employment decision; (3) he was qualified for the position; and (4) similarly situated, non-protected employees were treated more favorably. *Vincent v. Brewer Co.*, 514 F.3d 489, 494 (6th Cir. 2007). If the plaintiff establishes a prima facie case of either retaliation or discrimination, the defendant then has the burden of articulating a legitimate, non-discriminatory reason for its actions. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Wrenn*, 808 F.2d at 501. Once the defendant has set forth the non-discriminatory reasons, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the defendant's reasons were pretextual. *Burdine,* 450 U.S. at 253; *Wrenn,* 808 F.2d at 501.

McKenna has established that he engaged in a protected activity when he complained to his supervisor Carol Kagenski, concerning a co-worker's actions. *See Johnson v. Univ. of Cincinnati*, 215 F.3d

561, 579-80 (6th Cir. 2000). He has also shown that Nestle was aware of his complaints and that he suffered an adverse employment action when his employment was terminated. However, even assuming that McKenna has satisfied the final element of the prima facie case for retaliation and made a prima facie showing of gender discrimination, he has not met his burden of showing that Nestle's reason for terminating his employment was pretextual.

Nestle asserts that it terminated McKenna's employment because he violated the terms of its Electronic Communications Policy ("ECP") by sending and receiving sexually explicit emails and photos using his work computer. The ECP prohibits certain computing activities including accessing, sending, forwarding, and downloading pornographic, obscene, indecent, or other sexually explicit materials. The ECP provides that any employee who violates the policy is subject to disciplinary action up to and including termination. The evidence shows that McKenna violated the ECP by accessing and sending obscene, indecent, and other sexually explicit materials. In fact, McKenna admitted that he violated the ECP. Because Nestle has set forth a legitimate, non- discriminatory reason for terminating McKenna's employment, McKenna must show that the reason was pretextual by producing evidence sufficient for a reasonable finder of fact to reject Nestle's proffered reason. He can do so by showing that Nestle's proffered reason (1) has no basis in fact; (2) did not actually motivate its conduct; or (3) was insufficient to warrant the termination of his employment. *See Michael v.*

Caterpillar Fin. Servs. Corp., 496 F.3d 584, 597 (6th Cir. 2007).

McKenna argues that Nestle's proffered reason for terminating his employment had no basis in fact; that the evidence in support of its reason is inadmissible; and that his violation of the ECP did not motivate his discharge as shown by the temporal proximity between his complaints and his discharge, the gender bias of the supervisors who made the termination decision, and the fact that other employees, including his alleged harassers, were not discharged despite the fact that they also violated the ECP. McKenna's arguments are unavailing. First, as noted above, McKenna's own admission and the evidence of the explicit emails constitutes a factual basis supporting Nestle's proffered reason for terminating McKenna's employment. The fact that Nestle eventually deleted McKenna's email account does not make the email evidence inadmissible because McKenna has not shown that Nestle deleted the account in bad faith and copies of the emails were available. *See* Fed. R. Evid. 1004. McKenna has also not submitted evidence showing that Nestle treated him differently than other similarly situated employees when it discharged him for violating the ECP. While one of his alleged harassers was only suspended for violating the ECP, the evidence does not show that she engaged in comparable violations of the policy as she was reprimanded for using her work email for personal uses. Further, McKenna has not specifically identified any other Nestle employee who violated the ECP in a comparable manner yet avoided discharge. Finally, McKenna's evidence does not demonstrate that gender bias was a factor in his discharge.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit. We deny McKenna's motion to seal Nestle's appellate brief. Because the quotations from McKenna's deposition transcript which was sealed by the district court are neither crucial nor damaging, and in light of the fact that the district court itself quoted extensively in its public opinion from the sealed deposition, we hold that sealing of an appellate brief is not appropriate in this instance. Any concern for citation or quotation of a document sealed by the district court can be addressed by that court.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

No. 09-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN H. MCKENNA,
Plaintiff-Appellant,

v.

NESTLE PURINA PETCARE COMPANY,
Defendant-Appellee.

Mar 30, 2010

ORDER

Before: BOGGS, MOORE, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

STANDING ORDER GOVERNING CIVIL MOTIONS FOR SUMMARY JUDGMENT

SUSAN J. DLOTT
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

A. Motions for Summary Judgment

1. Movant's Statement of Proposed Undisputed Facts

There shall be attached to every opening brief in support of a motion for summary judgment a document entitled "Proposed Undisputed Facts", which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. All material facts set forth in this statement will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with (A)(2) of this Standing Order.

2. Opponent's Response to Proposed Undisputed Facts and Statement of Disputed Issue of Material Fact

There shall be attached to every brief in opposition to a motion for summary judgment a document entitled "Response to Proposed Undisputed Facts" which states, in separately numbered paragraphs corresponding to the paragraphs contained in the moving party's statement of Proposed Undisputed Facts, whether

each of the facts asserted by the moving party is admitted or denied. The Response to Proposed Undisputed Facts must also include, in a separate section entitled " Disputed Issues of Material Fact," a list of each issue of material fact as to which the opponent contends there is a genuine issue to be tried.

3. Citations

Each statement of material fact in a statement of Proposed Undisputed Facts or Response to Proposed Undisputed Facts, and each denial in a statement of Disputed Issues of Material Fact, must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial, (2) a sworn deposition, and/or (3) other evidence, including documentary evidence, that would be admissible at trial. The affidavits, deposition testimony responses to discovery requests, or other documents containing such evidence, unless already lodged with the Court, shall be filed and served with the statement of Proposed Undisputed Facts or Response in accordance with Federal Rule of Civil Procedure 56(e).

4. Form of Service

The statements referred to above shall be filed and served along with the motion, brief and certificate of service required by this Court's rules and Federal Rule of Civil Procedure 56.

5. Special Notice from Moving Parties to Pro Se Litigants

Any represented party moving for summary judgment against a party proceeding pro se shall file and serve, as a separate document, the form attached as Exhibit A to this Order. If the pro se party is not a plaintiff, or the case is to be tried to the Court rather than a jury, the movant may modify the notice as appropriate. The movant shall attach to the notice copies of this Standing Order and Federal Rule of Civil Procedure 56.

6. Striking and refilling of Briefs

The Court may, at its discretion, strike briefs that do not conform to the requirements above. Once a brief is stricken, a party must re-file a conforming brief within 30 days in order to preserve the motion.

B. Effective Date

This Order applies to all summary judgment motions filed on or after March 1, 2006.

IT IS SO ORDERED.

Susan J. Dlott
United States District Judge

EXHIBIT A

Notice to Pro Se Litigant Opposing Motion for Summary Judgment as Required by Standing Order Governing Motions for Summary Judgment

The purpose of this notice, which is required by the Court, is to notify you that the defendant has filed a motion for summary judgment asking the Court to dismiss all or some of your claims without a trail. The defendant argues that there is no need for a trial with regard to these claims because no reasonable jury could return a verdict in your favor.

THE DEFENDANT'S MOTION MAY BE GRANTED AND YOUR CLAIMS MAY BE DISMISSED WITHOUT FURTHER NOTICE IF YOU DO NOT FILE PAPERS AS REQUIRED BY RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S STANDING ORDER GOVERNING MOTIONS FOR SUMMARY JUDGMENT. COPIES OF RULE 56 AND THE COURT'S STANDING ORDER ARE ATTACHED TO THIS NOTICE, AND YOU SHOULD REVIEW THEM VERY CAREFULLY.

The papers you file must show one or both of the following:

(A) That you disagree with the defendant's view of the law governing your case; AND/OR

(B) That

(1) You disagree with the defendant's version of the facts;

(2) You have evidence contradicting the defendant's version; AND

(3) The evidence you rely on, if believed by a jury, would be sufficient to support a verdict in your favor. To make this showing, you must file one or more affidavits disputing the defendant's version of the facts. An affidavit is a sworn statement by a witness that the facts contained in the affidavit are true to the best of the witness's knowledge and belief. To be considered by the Court, an affidavit must be signed and sworn to in the presence of a notary public or other person authorized to administer oaths. In addition to affidavits, you may also file deposition transcripts, responses to discovery requests, and other evidence that supports your claims.

If you fail to submit evidence contradiction the defendant's version of the facts, your claims may be dismissed without further notice. It is therefore very important that you read the defendant's motion, memorandum of law, affidavits, and other evidentiary materials to see if you agree or disagree with the defendant's version of the relevant facts. It is also very important that you review the enclosed copy of Standing Order Governing Motions for Summary Judgment carefully. This Order provides detailed instructions concerning the papers you must file in opposition to the defendant's motion, including how you must respond to specific facts the defendant claims are undisputed, see (A)(2), and how you must support your claims with specific references to evidence, see (A)(3).

YOU MUST FILE YOUR RESPONSE PAPERS with the Clerk of the Court and serve a copy to defendant's counsel WITHIN 21 DAYS OF THE FILING OF DEFENDANT'S MOTION WITH THE CLERK OF COURT.

If you fail to follow these instructions, the defendant's motion may be granted.

Nestle Purina PetCare

North America

22 SOUTH FIRST STREET
P.O. BOX 38
ZANESVILLE, OH 43702-0038 USA
TEL 740 454 [illegible]
FAX 740 455 0781

October 19, 2004

Kevin McKenna
4885 Adamsville Road
Zanesville, OH 43701

Kevin:

This correspondence is provided to you in response to your e-mail dated October 18, 2004.

The decision, which led to your termination of employment, was based on your violation of the Information Security Policy as it relates to electronic communications. Additionally, you admitted to this violation. Furthermore, your termination has no relationship to any previous conversations you may have had with our local HR Manager.

At this time, we do not see need for continued discussion regarding this matter.

Regretfully,

Mitzi Link
Controller

cc: Dante Benincasa
Carol Kagenski

Nestlé

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Kevin H. McKenna, :
Plaintiff, :
v. : Case 2:05-cv-0976
Nestle Purina PetCare Company: Judge MARBLEY
Defendant. :

OPINION AND ORDER

Plaintiff, Kevin H. McKenna, filed this action against Nestle Purina PetCare Company, his former employer. He asserts that he was discharged after complaining of sexual harassment by a co-worker. The case is currently before the Court to consider a number of motions which the parties have filed and which relate to procedural matters including the pleadings and the conduct of discovery. The Court will describe each motion below as well as the disposition to be made of that motion. A separate order will issue addressing Mr. McKenna's motion to stay this litigation.

I.

A brief factual background is helpful to put each of the pending motions into context. According to Mr. McKenna's complaint, he advised the human resources manager at his workplace, Carol Kagenski, on August 31, 2004 that he was being sexually harassed by a co-worker named Nancy Goss. He alleges that he informed his immediate supervisor, Mitzi Link, of the same information on September 17, 2004, and that he advised both Ms. Kagenski and Ms. Link that he feared for his safety and the safety of his co-workers based upon Ms. Goss's conduct.

Ms. Goss's employment was terminated shortly thereafter. Apparently as a result of investigating Ms. Goss's conduct, Nestle began an investigation of the conduct of two other employees, Mr. McKenna and Lisa Ellis. On October 14, 2004, Mr. McKenna's employment was terminated because, according to Nestle, he violated its electronic communications policy based upon the content of certain e-mails which he had sent. Ms. Ellis was also disciplined, but she was suspended rather than discharged. Mr. McKenna claims in his complaint that the reasons given for his discharge were pretextual and that the real reason Nestle discharged him was in retaliation for his having complained about sexual harassment in the workplace. He seeks relief in this Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-5 et seq.

II.

Before turning to a discussion of each of the pending motions, the Court notes that the undersigned Magistrate Judge has held numerous conferences with Mr. McKenna and counsel for Nestle. The Court had concluded, as a result of those conferences, that many of the issues raised by the discovery- related motions had been satisfactorily resolved and that the parties were in a position to complete discovery without the need for further guidance from the Court. However, the parties recently advised the Court that rulings are necessary before discovery can be completed. Additionally, all pending discovery has been postponed while the Court considers the merits of the motion to stay. The following rulings will, hopefully, provide the parties with additional and necessary guidance when discovery resumes.

III.

The Court turns first to document #19, which is a motion filed by Mr. McKenna to strike document #18. Document #18 was a memorandum filed by Nestle in response to one of Mr. McKenna's previous motions. According to Mr. McKenna, #18 was filed after the Court-established deadline for filing the document (albeit only one day after) and contains a number of false statements concerning the facts surrounding Ms. Goss's suspension and termination as well as other facts relating to the background of this case. In response, Nestle asserts that the one-day delay in filing the document was due to a clerical error and notes that it was served on Mr. McKenna by the due date. In response, Mr. McKenna continues to argue vehemently that the factual portion of the memorandum contains many misstatements and should be stricken for that reason.

The Court accepts Nestle's explanation that the document was filed a day late due to a clerical error. Further, the Court has already ruled on the merits of the motion to which #18 was a response. That ruling did not require the Court to credit those factual statements set forth in #18. The Court notes that the facts of this case will ultimately be determined through either a summary judgment process or through trial, and neither of those processes will be affected by the statements set forth in #18. To the extent that Mr. McKenna asserts that Nestle's attorneys made factual statements in #18 which were unsupported by any evidence, the Court has had the occasion to review other filings in this case and notes that most of the statements set forth in #18 appear to be the version of the events set forth

by Nancy Goss. The Court understands that there may ultimately be a substantial controversy over whether Ms. Goss's recitation of these events is true. Nonetheless, it does not appear that Nestle or its counsel acted in bad faith in providing this statement of facts to the Court. For all of those reasons, the Court concludes that the motion to strike is not well-taken and it will be denied.

IV.

The next motion pending is document #23, a motion for protective order filed by Nestle on April 5, 2006. The Court concludes that this motion was resolved as a result of discussions held at a discovery conference and it will be denied as moot.

V.

The Court turns next to two related motions. On April 14, 2006, Mr. McKenna filed a motion (#25) asking the Court to deem his requests for admissions which were served on March 6, 2006 to be deemed admitted because Nestle had not responded to them. On May 4, 2006, Nestle filed a motion (#28) asking the Court to strike Mr. McKenna's motion. The primary issued raised by these two motions is whether the Court directed Nestle to respond to the requests for admissions within one week of the April 6, 2006 discovery conference. Apparently, Nestle responded to the requests on April 28, 2006.

The Court has reviewed its notes of the April 6, 2006 discovery conference and advises the parties of the following. Nestle was directed to provide Mr. McKenna with information within a week of that conference on two issues. The first was whether it had located any additional documents relating to the prior discipline of Mr. McKenna for alleged sexual harassment. The second was whether Nestle had

located additional documents about its human resources process reflecting how Nestle processed Mr. McKenna's sexual harassment charge concerning Ms. Goss. Other matters discussed at the conference, including the question of whether Nestle would be required to respond to all of Mr. McKenna's interrogatories and requests for admissions, were tabled for further discussion between the parties. Thus, until such time as the Court actually entered an order directing Nestle to respond to the requests, or the parties reached an agreement concerning such a response, Nestle's responses were not overdue. Given the fact that Nestle has represented that it responded on April 28, 2006, and the fact that that date appears consistent with the discussions had at the April 6, 2006 discovery conference, there is no merit to Mr. McKenna's motion. At the same time, however, there is no reason to strike it from the record. Both motions will therefore be denied.

VI.

On June 12, 2006, Mr. McKenna filed a motion (#41) asking for sanctions against Nestle for failure to comply with a Court order and for failure to cooperate in discovery. This motion relates to Nestle's effort to retrieve the contents of Mr. McKenna's e-mail account. Nestle represented on a number of occasions that it had the ability to retrieve the contents of Mr. McKenna's e-mail account only for a seven-day period prior to its search for such e-mails. It apparently provided Mr. McKenna with an affidavit from an individual named Larry Swift that employees' e-mail accounts are overwritten beginning on the eighth day after a message is either sent or received and that no additional e- mails beyond the ones produced by Nestle actually exist.

The issues raised by the motion for sanctions are issues which the Court cannot resolve unless further discovery is conducted. As Nestle notes, Mr. McKenna is free to depose either Mr. Swift or other Nestle individuals, or to ask additional questions to Nestle, concerning its alleged practice of overwriting e-mail accounts on the eighth day after e-mails are generated or received. If additional evidence comes to light indicating that Nestle had such information at the time Mr. McKenna made his request, or at the time that he filed his lawsuit, but intentionally deleted that information or negligently permitted it to be destroyed, an issue concerning spoliation of evidence might arise, and sanctions might be considered. Without any additional information, however, the Court is simply not in a position to make a factual determination as to whether Nestle or Mr. McKenna has the better of this argument.

The Court does note, as Mr. McKenna points out, that when he was discharged, seven specific e-mails were identified as containing communications that violated Nestle's electronic communications policies. Most of those e-mails were significantly more than seven days old. One was almost two years old. It is unclear how Nestle was able to retrieve these e-mails if its policy operated as described in its response to Mr. McKenna's motion. The Court suggests that Nestle investigate this matter and be prepared, if requested in discovery, to provide a further explanation of how the apparent discrepancy between its ability to retrieve e-mails in October 2004 and its current ability can be explained. Nevertheless, on the basis of the present record, Mr. McKenna's motion for sanctions will be denied without prejudice to its renewal should additional

evidence develop during the course of discovery which would contradict the representations Nestle has made concerning its ability to reconstruct e-mail accounts.

VII.

On June 12, 2006, Mr. McKenna filed a motion (#42) for an evidentiary ruling and to compel the disclosure of documents withheld under claim of privilege. The responsive and reply memoranda filed in connection with this motion indicate that Nestle did prepare and supply to Mr. McKenna a privilege log indicating that a number of documents were withheld on grounds of attorney-client or work product privilege. Mr. McKenna claims that many of the documents cannot be shielded by the privilege because Nestle waived any privilege relating to its investigation of his claims of sexual harassment because, in its answer, it raised the defense of adequate investigation as a way to avoid respondeat superior liability for actions taken by non-supervisory personnel. Mr. McKenna cites the First Circuit Court of Appeals' decision in United States v. Massachusetts Institute of Technology, 129 F3d. 681 (1st Cir. 1997) in support of his argument that pleading such a defense is a waiver of any otherwise-applicable privilege.

The citation of the Massachusetts Institute of Technology case is inapposite. That case deals with the waiver of privilege through the voluntary disclosure of privileged communications. Here, there is no evidence that Nestle has voluntarily disclosed the documents at issue to anyone. Thus, there has been no waiver of the privilege though disclosure. However, there is case law suggesting that by pleading the defense of adequate investigation (a

defense set forth in detail in two Supreme Court decisions, Burlington Industries v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)) an employer may waive privileges for documents related to that investigation. For example, in Walker v. County of Contra Costa, 227 F.R.D. 529 (N.D. Cal. 2005), the court found a waiver where the employer hired an attorney to investigate the plaintiff's claims of discrimination and then used the results of that investigation as a defense to a claim of vicarious liability. See also Brownell v. Roadway Package System, Inc., 185 F.R.D. 19 (N.D.N.Y. 1999). These cases make clear, however, that the waiver extends only to documents which constitute evidence of the investigation of the claim of harassment or discrimination. If an attorney had been consulted about an investigation but did not himself or herself conduct interviews, make disciplinary decisions, or otherwise participate in the investigation itself, the contents of the attorney's advice to the client about the investigative process and the decisions made by the employer remain privileged. See Waugh v. Pathmark Stores, 191 F.R.D. 427 (D.N.J. 2000). Nevertheless, as the Court in McGrath v. Nassau County Healthcare Corp., 204 F.R.D. 240, 245 (E.D.N.Y. 2001) noted, "it is inconsistent for [an employer] to invoke the Faragher-Ellerth defense but to retain the documents necessary to evaluate the sufficiency of its response as required by that defense."

Here, Nestle has asserted (albeit without an affidavit or other evidentiary document to support that assertion) that all the attorney-client privilege documents generated during the time frame during which Mr. McKenna was being investigated

constituted advice given by counsel located in Glendale, California to Nestle concerning the proper response to make to Ms. Goss's allegations. Assuming that to be true, and that those attorneys did not personally engage in the investigation, conduct interviews, or make decisions, their advice would be privileged. Further, the Court notes that the only pertinent investigation relating to the Faragher-Ellerth defense would be the investigation conducted concerning Mr. McKenna's claims of harassment by a co-worker, and not Nestle's investigation of the claims by Ms. Goss that Mr. McKenna engaged in some type of objectionable conduct. These documents do not appear to relate to that investigation and, in fact, it does not appear that many, if any, documents were generated concerning Mr. McKenna's complaint. Nestle has also represented that it has located and turned over to Mr. McKenna any documents which made up that investigation. For these reasons, it appears to the Court that Nestle's privilege log was properly compiled and that the documents which Mr. McKenna seeks are, in fact, covered by the attorney-client privilege. Again, however, Mr. McKenna is free to pursue in discovery the question of how, if at all, either the Glendale, California attorneys or other attorneys were involved in an investigation of his claims of harassment and to seek disclosure of any documents which might have been generated by attorneys who acted on Nestle's behalf in conducting such an investigation, as opposed to simply providing legal advice to Nestle during the course of that investigation. Thus, his motion to compel will be denied.

VIII.

On June 16, 2006, Mr. McKenna filed a motion requesting the Court to clarify what occurred at the April 6, 2006 discovery conference. Hopefully, the information provided in response to document #41 accomplishes that task. As stated, the Court's notes indicate that Nestle was to take certain actions within a week of the conference and the balance of the issues were to be subject to further discussion between Mr. McKenna and counsel. Mr. McKenna is free to raise, if necessary, any additional issues if he believes that Nestle has not fully complied with the Court's directives at the conference.

IX.

On July 31, 2006, Mr. McKenna filed a motion for leave to amend his complaint. In it, he asserts that he should be entitled to amend his complaint to assert a claim of sexual harassment dating back to 2002. Nestle has opposed this motion for a number of reasons, including that Mr. McKenna unduly delayed asserting the claim and that it is beyond the statute of limitations and was never properly presented to the EEOC. In response, Mr. McKenna has attached information which appears to indicate that this claim may have been part of the charge which he filed with the EEOC. The Court believes that, given the fact that most of Nestle's opposition to this claim relates to whether or not it may properly be brought, a better exercise of discretion would be to permit Mr. McKenna to amend his complaint to include the claim. If Nestle believes the claim is then subject to dismissal on jurisdictional or limitations grounds, it may file an appropriate motion and obtain a ruling from the District Judge assigned to the case. See, e.g., Morse/Diesel, Inc. v.

Fidelity and Deposit Co. of Maryland, 715 F.Supp. 578, 581 (S.D.N.Y. 1989).

X.

On August 7, 2006, Mr. McKenna filed a motion for protective order limiting the scope of discovery. In it, he complains that Nestle has demonstrated an intent to expand discovery beyond his complaints of harassment against Ms. Goss and his alleged improper use of his e-mail account by delving into personal matters such as whether he has engaged in extramarital affairs, fathered children out of wedlock, and other similar matters. Nestle responded to the motion by asserting that it had not insisted on responses to interrogatories covering those areas (although it did propound such interrogatories) and that Mr. McKenna's motion for a protective order was premature. However, Mr. McKenna's response indicates that, after Nestle made that statement, it then requested him to answer the questions or face a motion to compel. Consequently, the Court concludes that the issues raised by the motion are ripe for decision.

Nestle has not directly defended its position concerning these inquiries. Given the current state of the record, the Court does not believe that inquiries concerning Mr. McKenna's relationship history have anything to do with the single claim of discrimination propounded in this case relating to a very abbreviated time frame between when he first notified Nestle officials that he was being harassed by Ms. Goss and when his employment was terminated, a period of less than two months. Further, they do not relate to the proffered reason for Mr. McKenna's termination, nor would it appear that they are an effort to acquire evidence which, if it had

been known to Nestle at the time, would have supported the termination of Mr. McKenna's employment. It does not appear that Nestle would have refused to hire, or would have discharged, individuals who either engaged in extramarital affairs or who fathered children out of wedlock. Thus, the current state of the record supports Mr. McKenna's request for a protective order on these subjects. However, should additional claims be made or additional evidence be presented which might make these matters relevant, the Court will revisit the issue upon request.

XI.

Based upon the foregoing, the following motions are denied: #19, 23, 25, 28, 41, 42, and 43. #49 and #51 are granted. Mr. McKenna shall file his amended complaint within twenty days of the date of this order, and that filing deadline will not be affected by his more recent request for a stay. Any party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless

stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge

172

(3)

Supreme Court, U.S.
FILED
OCT 4 - 2010

No. 10-318

IN THE

Supreme Court of the United States

KEVIN H. McKENNA,

Petitioner,

v.

NESTLÉ PURINA PETCARE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner Kevin H. McKenna (hereinafter "Petitioner") requests this Honorable Court to enact new law requiring litigants enter into a stipulation of facts prior to a defendant being afforded the opportunity to move for summary judgment in an employment discrimination case brought by pro se plaintiff. Based on the arguments contained within the Petition, Respondent Nestlé Purina PetCare Company (hereinafter "Respondent") believes the actual question presented is whether the Appellate Court erred in affirming the District Court's grant of summary judgment in favor of Respondent.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Nestlé Purina PetCare Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. Petitioner Presents No Compelling Reason For Granting The Petition	5
II. Petitioner Does Not Establish Respondent Committed Fraud On The Court.	6
III. Petitioner Never Asserted A Claim For Supervisory Harassment.	9
IV. The District Court And Appellate Court Considered The Totality Of The Circumstances.	10
V. Respondent Did Not Rely On After Acquired Evidence.	10
VI. Petitioner's Claims Were Heard.	14
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 122 S. Ct. 511, 151 L.Ed.2d 489 (2001) 6

Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080 (Fed. Cir. 1993) 8

Delli Santi v. CNA Ins. Companies, 88 F.3d 192 (3rd Cir. 1996) 10

McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) 10

Jacobellis v. State of Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, P., concurring) 13

United States Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) 14

RULES

Fed. R. Civ. P. 56 14

Title VII, 42 U.S.C. 2000e 14

STATEMENT OF THE CASE

Petitioner's Statement of the Case spans fourteen (14) pages, most of which is either irrelevant or inaccurate. Petitioner omits numerous facts relevant to the Petition.

Petitioner and Ms. Nancy Goss (hereinafter "Goss"), a co-worker, were involved in sexual relationship that Petitioner refers to as "consensual" and "very casual, 'adulterated' type workplace friendship." Pet. App. Br., p. 4. This relationship ended in July 2004.

Petitioner approached the Human Resource Manager at Respondent's Zanesville, Ohio Plant, Carol Kagenski (hereinafter "Kagenski"), on August 31, 2004 regarding Goss. *Id.* at p. 5. Petitioner informed Kagenski that he felt Goss was exhibiting jealously when Petitioner interacted with other female employees. Pet. App., p. 3a; D.C. R[1]. 127 at Exhibit A. Petitioner specifically requested that Kagenski take no action based on their conversation. Petitioner followed-up this verbal request that Kagenski take no action with a written request that Kagenski take no action. Pet. App., p. 20a. Petitioner stated, "It is not, and was not my intent to file a complaint or take any sort of 'Action' in regards to the matter." *Id.* Petitioner reiterated, "It is with this document that I am making it formally known that it is my (emphatic) wish that there be absolutely NO ACTION taken by the company in any way shape or

1. Petitioner omits several relevant documents from his appendix. As such, D.C. R. is a reference to the record in the District Court.

form regarding this matter at this time." *Id.* [emphasis in original].

Goss witnessed Petitioner approach Kagenski and assumed Petitioner did so to discuss her. Goss approached supervisor Mary "Mitzi" Link (hereinafter "Link") and requested Link arrange a meeting between her and Kagenski. Pet. App., p. 3a. Goss then informed Kagenski that she and Petitioner were involved in an eleven (11) month affair that recently terminated. Petitioner had not informed Kagenski of this relationship. D.C. R. 127 at Exhibit A. Kagenski concluded that Petitioner and Goss were merely experiencing the usual post-breakup pains and decided the best of course of action was to monitor the situation. Pet. App., p. 3a.

Since the termination of her relationship with Petitioner, Goss believed that Petitioner and Ms. Lisa Ellis (hereinafter "Ellis"), another employee of Respondent, began a sexual relationship. Pet. App. Br., p. 5. Goss's belief was not without foundation given that Respondent, Goss, and Ellis previously engaged in sexual acts together. Pet. App., p. 2a. On or about September 24, 2004, Goss sent Ellis a letter that was hostile and threatening. *Id.* at pp. 3a-4a. Ellis presented this letter to Link, who in turn provided a copy to Kagenski. *Id.* at 4a; Pet. App. Br., p. 6.

Respondent determined the letter Goss sent Ellis was threatening and hostile and suspended Goss's employment on October 1, 2004. Pet. App., p. 4a. It was during this time, that Respondent's Corporate Human Resource Manager, Garry DeWit (hereinafter "DeWit"),

decided to monitor and review the email accounts of Goss, Ellis, and Petitioner. Pet. App., p. 4a; D.C. R. 127 at Exhibit A and Exhibit C. During a review of the email accounts, Respondent discovered sexually explicit emails and pornographic pictures that Petitioner sent and received with his company email account and his company computer. Pet. App., p. 4a. After discovering these emails, Petitioner was suspended on October 8, 2004. D.C. R. 127 at Exhibit A. Petitioner's actions were in direct contravention of Respondent's Electronic Communication Policy (hereinafter "ECP").

Among the pictures that Petitioner sent and received, four (4) depicted a male stripper in various sexual poses with a female. Pet. App., p. 4a. Petitioner does not dispute these pictures were discovered on his computer and admits they were pictures of a stripper. Petitioner states, "The pictures referenced are pictures of a friend, 4 of which are at a Bachelorette party with a *professional* male 'stripper...'" D.C. R. 3-2, p. 7 [emphasis in original].

Another email was Petitioner's account of masturbating at his desk. Pet. App., p. 26a. In this email, Petitioner states, "...found out something interesting...was sitting here a bit ago...*HAPPENED* to have my hand across my lap...started tapping my fingers...jeans were tight enough I could FEEL the tapping across my c#ck...felt GOOD..." *Id.* [all emphasis and punctuation in original].

Yet another email described a sexual interaction with another female, Tammy Sparks, in which Petitioner stated, "you'll be able to feel yourself contracting all

over your hand, how wet, excited you are/get, how your cunt gushes from being HF'd..MMm." Pet. App., p. 26a. Not only was this email sent from Petitioner's company computer, but it was also sent from Petitioner's company email account. Petitioner did not dispute this email was discovered on his computer. Petitioner describes his email to Tammy Sparks as: "Mr. McKenna and Ms. Sparks were simply scheduling a date as expressly permitted by the policy." Petitioner further states, "The remark was within the context of Ms. Sparks and Mr. McKenna's friendship, and was non-offensive to any of the parties involved. The Electronic Communications Policy does not explicitly prohibit an and all sexual content." D.C. R. 3-2, p. 8.

Petitioner's argument to this Court that sexually explicit emails and pornographic pictures were not discovered in his email account or on his company computer is based on the fact that Petitioner does not consider these emails sexually explicit or pornographic. Petitioner was employed as an Information System Technician. Pet. App., p. 1a. As such, Petitioner and one other employee at Respondent's Zanesville Plant oversaw Respondent's computer system. The proverbial fox was in the hen house.

After discovering these sexually explicit emails and pornographic pictures, Respondent suspended Petitioner's employment. Respondent then completed its investigation of the letter Goss sent Ellis and terminated Goss's employment. On October 14, 2004, Respondent also terminated Petitioner's employment for violating the ECP. Respondent's review of Goss, Ellis, and Petitioner's emails also uncovered violations of the

ECP by Ellis. Pet. App., p. 4a. Ellis was placed on an action plan and suspended three (3) days as Respondent determined her violations of the ECP involved excessive personal use of the email system. Ellis did not, however, send and receive sexually explicit emails or pornographic pictures. *Id.*

Petitioner asserts he was not made aware of the basis for his termination; yet, on October 18, 2004, Petitioner sent an email to Respondent requesting he be permitted to return to his position. In this email, Petitioner admits to violating Respondent's ECP and states, "...I KNOW that I have violated the Electronic Communications Policy, I'd never in my wildest dreams even think of challenging that fact..." Pet. App., p. 11a [emphasis in original]. This was not an offhand comment by Petitioner as he again asserted, "The point of the previous paragraph is that I very full and well know I was/am in violation of the company's Electronic Communications Policy. I am/was also fully aware of the potential consequences (IE- up to, and including possible termination). *Id.* Despite this prior admission, Petitioner attempted to convince the District Court, the Appellate Court, and now this Honorable Court that he did not violate Respondent's ECP. Petitioner's arguments are without merit.

REASONS FOR DENYING THE PETITION

I. Petitioner Presents No Compelling Reason For Granting The Petition.

Petitioner advances no legitimate or significant reason for granting his petition. Petitioner misinterprets

the after acquired evidence doctrine, disregard's the District Court's reliance on undisputed and uncontroverted evidence, and attempts to allege fraud on the court by Respondent's reference to his relationship with Goss as romantic. There is no legitimate basis for granting Petitioner's Petition. This is a case where Petitioner does not agree with the outcome, nothing more. Petitioner cites no conflict among the Circuit Courts based on the Sixth Circuit's ruling and cites no issue of great importance other than Petitioner's own self-interest in continuing his crusade against Respondent.

This is now the second Petition that Petitioner has filed with this Honorable Court. *See* Case No. 10-121, cert. denied. Both Petitions are devoid of any cohesive argument in favor of granting Petitioner's request and both petitions are laced with personal attacks on Nestlé's Counsel without any legal or factual support.

The question Petitioner presents was not brought before the District Court or Appellate Court. As such, this Court should decline to address it. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109, 122 S. Ct. 511, 151 L.Ed.2d 489 (2001).

II. Petitioner Does Not Establish Respondent Committed Fraud On The Court.

Petitioner argues that Respondent committed fraud on the court by referring to his relationship with Goss as a romantic relationship. Petitioner previously referred to his relationship with Goss as a "consensual" and "adulterated friendship." Petitioner does not

dispute that he and Goss shared a sexual relationship. Petitioner admitted that his relationship with Goss involved sensual/erotic conversations via email that spawned sexual events between Petitioner and Goss. Pet. App., p. 27a. Petitioner does not dispute that he, Goss, and Ellis engaged in sexual acts, and Petitioner does not dispute that his email to Tammy Sparks was an attempt to schedule a date. Yet, somehow Respondent's reference to Petitioner's relationship with Goss as romantic is fraudulent and "*defaming* McKenna, McKenna's wife and McKenna's marriage..." Pet., p. 19. Apparently engaging in an eleven month affair, engaging in sexual acts with two other women and scheduling a date with another woman is within the bounds of Petitioner's marriage, but referring to Petitioner's affair as romantic is defamatory. Petitioner's arguments are beyond the realm of reasonableness and lack any basis.

Petitioner's arguments are also irrelevant. It does not matter whether Petitioner and Goss simply engaged in sexual acts, engaged in an affair, or engaged in a romantic relationship. What matters is it is undisputed this relationship was consensual. Even if the relationship was not romantic, it was still consensual and the consensual nature of the relationship is what formed the basis for the District Court granting Respondent's motion for summary judgment. Further, Petitioner testified that after his relationship with Goss terminated, Goss did not make any sexual advances, did not make any threats, and did not make any demands. Pet. App., pp. 3a, 18a-19a. Petitioner's arguments regarding the nature of the relationship do not affect the outcome of this case. Referring to Petitioner's

relationship as romantic does not rise to the level of committing fraud on the court. As Petitioner notes, "This, 'fraud on the court' is typically confined to the most egregious cases..." *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 1085-86 (Fed. Cir. 1993). Referring to Petitioner's relationship with Goss as romantic is not egregious but semantic. If referring to this relationship as romantic was improper it certainly does not rise to the level of committing fraud on the court.

Petitioner asserts that Respondent committed fraud on the court by referring to Link as another supervisor. Pet., p. 27. Respondent has never disputed that Link was the supervisor to both Petitioner and Ellis. It appears Petitioner is attempting to argue the District Court and Appellate Court erred in not referring to Link as the supervisor for both Ellis and Petitioner. Again, any such argument is irrelevant. The facts demonstrated that both Petitioner and Ellis were disciplined for violating Respondent's ECP. Petitioner was terminated based on sending and receiving sexually explicit emails and pornographic pictures. Petitioner was one of two (2) employees in charge of computer system for Respondent's Zanesville Plant. Ellis, an accounting clerk, violated the ECP by using her company computer and email for excessive personal use. Pet., p. 4a. Petitioner and Ellis did not engage in the same conduct. Any inference that they were similarly situated and treated differently is simply not based on fact. Both the District Court and Appellate Court analyzed whether Petitioner and Ellis were similarly situated and both determined they were not based on their different job duties and, most significantly, that Petitioner and Ellis

did not engage in the same conduct. Pet. App., pp. 24a, 33a. Accordingly, the District Court and Appellate Court properly determined that Petitioner and Ellis were not similarly situated.

III. Petitioner Never Asserted A Claim For Supervisory Harassment.

Petitioner never asserted a claim for harassment or hostile work environment based on Link's conduct. Petitioner misleads this Court in asserting that any claims based on Link's conduct were before the District Court as Petitioner never filed the proposed amended complaint containing these claims. Petitioner's "Amendment [sic] to Complaint" specifically stated, "Within the initiating Motion to amend [sic], the Plaintiff had represented that he wished to raise additional matters. Since the filing of the Motion to Amend, due to a number factors..., the Plaintiff chooses not to raise additional matters in the Statement of Claim at this time." D.C. R. 83. Petitioner attempts to mislead this Court by citing to his motion to amend the complaint and the "Supplemental Statement of Claim" appended thereto. Petitioner fails to inform this Court that once he was granted leave to amend, he did not file this "Supplemental Statement of Claim." Instead, Petitioner filed an amended complaint that only asserted state law claims. No claim for harassment or hostile work environment was before the District Court; however, the District Court still noted that Petitioner could not succeed on any such claim even it had been advanced. Pet. App., p. 27a.

IV. The District Court And Appellate Court Considered The Totality Of The Circumstances.

Petitioner advances no substantive argument that the District Court or Appellate Court failed to properly consider the totality of the circumstances. This omission is likely intentional because Petitioner cannot advance any such argument. The District Court considered the totality of the circumstances and relied on Petitioner's own deposition testimony in dismissing Petitioner's claims for sexual harassment and hostile work environment. Petitioner testified that after the consensual relationship with Goss terminated, Goss did not make any sexual advances, threats, demands, or sexual remarks. Pet. App., pp. 3a, 18a-19a.

V. Respondent Did Not Rely On After Acquired Evidence.

Petitioner's argument that Respondent relied on after acquired evidence is misplaced. Petitioner simply does not understand the after acquired evidence doctrine. The after acquired evidence doctrine applies when the legitimate, nondiscriminatory reason for the adverse employment action was "non-existent at the time of the adverse decision..." *Delli Santi v. CNA Ins. Companies*, 88 F.3d 192, 205 (3rd Cir. 1996). As this Honorable Court noted, after acquired evidence does not operate to bar all relief. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). The after acquired evidence doctrine presumes the adverse employment action suffered by the employee was a result of discrimination. More importantly, the bedrock of the after acquired

evidence doctrine is that the employer is permitted to introduce evidence of an employee's wrongdoing even though the employer was unaware of the wrongdoing when it made the adverse decision. That is not the case here. Here, Respondent possessed evidence of Petitioner's wrongdoing when it made the decision to terminate Petitioner.

Respondent uncovered sexually explicit emails and pornographic pictures prior to Petitioner's termination. Pet. App., p. 4a; D.C. R. 127 at Exhibit A and C. Both Kagenski and DeWit attested to this fact and Petitioner previously admitted these emails were uncovered on his company computer. Petitioner, instead, argued these emails were not sexually explicit or pornographic. Respondent then terminated Petitioner based on these emails. The District Court properly determined that reasonable minds could only conclude that the emails Petitioner sent and received were sexually explicit. Pet. App., p. 13a-14a.

Petitioner argues that Goss's deposition testimony was inadmissible and could not support Respondent's motion for summary judgment. Petitioner asserts, "It is simply, factually 'impossible' that statements made by Goss in 2006 could have affected Nestlé's motives/decisions in 2004!!" Pet., p. 33 [emphasis removed]. Petitioner argues that Respondent cannot rely on Goss's deposition testimony because her deposition occurred after his termination. *Id.* Following Petitioner's reasoning, a defendant could never use deposition testimony or trial testimony to defend a claim or lawsuit because such testimony is obtained after the adverse employment action.

Petitioner seriously confuses the after acquired evidence doctrine. Statements made by Goss during her depositions were not used to terminate Petitioner or justify his termination. Goss's statements were used to refute Petitioner's claims that he suffered retaliation or harassment. Goss's deposition testimony was used to defend Petitioner's claims, not to justify the legitimate, nondiscriminatory reason for Petitioner's termination.

Petitioner also confuses the statement made by Respondent in the October 19, 2004, letter sent to Petitioner. This letter stated, "Furthermore, your termination has no relationship to any previous conversations you may have had with our local HR Manager." Pet. App., p. 42a. It is clear that this letter states Petitioner's termination was not related to any conversation he had with Kagenski. Petitioner's termination was based on violating the ECP and not because he informed Kagenski of Goss's jealously on August 31, 2004. Petitioner somehow misinterprets the clear language of this letter and attempts to argue that Respondent cannot now rely on statements made by Goss based on representations made in this letter.

Contrary to Petitioner's arguments, the sexually explicit emails and pornographic pictures do exist on the record. It is not without design that Petitioner specifically argues that pornographic pictures were not discovered in his company email account. Pet., p. 38. Petitioner does not argue the sexually explicit emails were not discovered in Petitioner's Outlook and Petitioner does not argue the pornographic pictures were not sent from his company computer and through

Respondent's computer network. Petitioner attempts to mislead this Court with his arguments because the sexually explicit emails were discovered in Petitioner's Outlook while the pornographic pictures were sent from Petitioner's Outlook account and saved on Petitioner's computer, as evidenced by the following reference on the pictures: file://C:\Zanesville%20-%20McKenna\5jpg. D.C. R. 127 at Exhibit A.

Contrary to Petitioner's arguments, the emails were attached to the affidavits of both Kagenski and DeWit, who both attested to their authenticity and both attested they were discovered on Petitioner's computer. Petitioner argues that he would not still be pursuing this case if pornographic pictures were actually discovered on his computer. Petitioner does so because he does not believe the emails are sexually explicit and does not believe the pictures are pornographic. Pet., p. 37. Petitioner previously admitted he sent and received these emails and pictures. D.C. R. 3-2. Petitioner sees nothing wrong with pictures of a male stripper in various sexual positions with a female and does not view the word "cunt" as vulgar. Pet. App., p. 13a-14a. In short, Petitioner is not disputing he sent and received these pictures, but is disputing they were sexually explicit and/or pornographic. This contention is obviously without merit. There is no clear-cut definition of sexually explicit or pornographic, "But, I know it when I see it...," as Justice Potter Stewart concluded. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, P., concurring). Respondent knows it too, and terminated Petitioner's employment based on these sexually explicit emails and pornographic pictures.

VI. Petitioner's Claims Were Heard.

In the ultimate paradox, Petitioner asserts he will not stipulate to anything but the names of the parties in this case and then argues that "summary judgment is untenable in the absence of *stipulation* of facts..." Pet. p. 42-43 [emphasis in original]. Civil Rule 56 and years of case law disagree with Petitioner. Petitioner then argues this Court should enact law, "By this Court simply enacting law that in *all employment discrimination cases*, that a plaintiff, particularly in the case of a *pro se* plaintiff, would be *lawfully* entitled to *full opportunity* to enter into a *stipulation of facts and claims* ***before*** summary judgment..." Pet. p. 45 [emphasis in original]. Petitioner essentially requests this Court rewrite Federal Rule of Civil Procedure 56 and Title VII. While this Court is vested with great powers, enacting law is not one of those powers. The civil rules of litigation generally apply to Title VII cases. *See United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

Petitioner's request is not practical even if this Court had authority to enact law. If such a stipulation was required before a defendant could move for summary judgment then plaintiffs who refuse to stipulate to any facts, such as Petitioner, could effectively hold a defendant and the course of litigation hostage by such refusal. A defendant would then not be permitted to move for summary judgment, which would effectively insure all employment discrimination cases proceeded to trial. The defense bar may approve as attorney fees for each employment discrimination case would sky

rocket, but this is simply not feasible and not what the law requires. Petitioner's suggestion is also not applicable to the facts of this case. As stated, Petitioner admitted the emails were discovered on his computer and admitted he violated the ECP before he even filed his complaint. In essence, Petitioner entered into a stipulation before he even filed a lawsuit.

Petitioner's citation to the Honorable Judge Dlott's standing order is intended to mislead this Court. This case was not before Judge Dlott and Judge Dlott's standing order was not applicable to these proceedings. Further, Judge Dlott's standing order does not require a stipulation of facts prior to a party moving for summary judgment. Judge Dlott's standing order requires all material facts find support in deposition testimony, affidavits, or other evidence. Pet. App., p. 37a. Respondent's motion for summary was supported by deposition testimony, affidavits, and other evidence. Petitioner did not and could dispute this evidence. As such, the District Court granted Respondent's motion for summary and the Appellate Court determined this decision was proper.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court deny the Petition.

Respectfully submitted,

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173

No. 10-318

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In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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October 19, 2010

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUMMARY OF POSITION 1

ARGUMENT 2

I. McKenna's Pending Complaint of Attorney Misconduct 2

II. ORDER by Chief Judge of the Circuit Court 4

III. "SUMMARY JUDGMENT" 4

a. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury 5

b. Respondent's version of events (unsurprisingly) differs substantially from [Petitioner's] version 5

c. Courts are *required* to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." 6

i. Nestle's Recent Argument Regarding Chief Judge Batchelder's ORDER Before the District Court 6

ii. Reasonable Inferences Drawn From Chief Judge Batchelder's ORDER Most Favorable to McKenna 7

TABLE OF CONTENTS
(Continued)

Page

IV. Additional Support for Granting the Petition 9

a. Petitioner's Question No. 1: Should an employment Civil Rights plaintiff lawfully be afforded a "Right to be Heard"? 9

b. Petitioner's Question No. 2: Will the United States Supreme Court please grant the pro se Petitioner in this case an exercise of this Court's supervisory power? 9

CONCLUSION 10

TABLE OF CONTENTS - APPENDIX

Page

Order - Complaint of Misconduct (Reformatted) 1

Order - Complaint of Misconduct & Cover Letter (Original Image – Resized/Reduced) 2-3

TABLE OF AUTHORITIES

Page

CASES

Scott v. Harris,
127 S. Ct. 1769 (2007). 5-6

OTHER AUTHORITIES

United States Court of Appeals for the Sixth Circuit;
6 Cir. R. 46 (Attorneys - Admission of Attorneys and
Attorney Discipline)..... passim

SUMMARY OF POSITION

The Petitioner has consistently maintained throughout this litigation that Respondent's counsel has engaged in systemic misrepresentation of facts and evidence in this case. The trial and appellate courts have been unsympathetic, disregarding Petitioner's consistent complaints of Attorney Misconduct, and at summary judgment, accepted the moving party/Respondent's version of facts.

Left with no recourse, Petitioner filed a Formal Complaint of Attorney Misconduct with the Chief Judge of the Circuit Court, which had remained unanswered through denial of rehearing and extended time period of filing the Petition with this Court. Petitioner's pending Complaint of Attorney Misconduct with the Chief Judge of the Circuit Court, pending Motion to Set Aside the District Court's GRANT of summary judgment for Fraud on the Court, and only several issues of misconduct within the lower courts were raised within Petitioner's Brief with this Court.

During the course of filing the instant Petition with this Court, upon consideration of the Petitioner's Complaint of Attorney Misconduct *and* the documentation offered in support thereof the Chief Judge of the Circuit Court determined Petitioners Complaint to be sufficiently meritorious to ORDER actions of Respondent's Counsel of Record *in this case* be brought before *disciplinary board* of the Supreme Court of Ohio.

As this case was decided on summary judgment where courts are now *required* to draw inferences most favorable to the Petitioner. The Chief Judge's ORDER provides reasonable and objective

support that Respondent's motion for summary judgment had *not* been *properly* supported, rendering the lower courts prior AFFIRM and GRANT of summary judgment to the Respondent no longer tenable.

The Chief Judge's recent ORDER now also constitutes substantial, objective evidence supporting this Petition seeking protection for employment Civil Rights litigants across the nation from employers' abusive litigation practices throughout the complaint processes. The Petitioner now respectfully calls upon the United States Supreme Court to seize upon this modern day "David and Goliath" confrontation as an unequaled opportunity to send an unambiguous message to employers across the country, that the United States will not tolerate an employer's exercise of abusive litigation practices as a means to defeat important employment Civil Rights policies.

It is but for the lower court's *untimely* initiation of remedy for *abusive* litigation practices in this "David and Goliath" employment Civil Rights case, that now presents this uniquely situated Court with landmark opportunity to vindicate an important congressional policy by guaranteeing employees across the nation a "Right to be Heard" against discriminatory employment practices.

ARGUMENT

I. McKenna's Pending Complaint of Attorney Misconduct

The Petitioner Kevin H. McKenna (McKenna) raised the issue of McKenna's pending Formal Complaint of Attorney Misconduct (Complaint) at pages 16-18 and pages 48-49 of Petitioners Brief,

against Brian E. Dickerson and Jonathan R. Secrest (named Attorneys) as Respondent Nestle Purina PetCare Co.'s (Nestle) counsel of record in this case. McKenna's Complaint against the named Attorneys was filed with Chief Judge Alice M. Batchelder (Chief Judge Batchelder) of the United States Court of Appeals for the Sixth Circuit (Circuit Court) on the 11th day of January 2010 and docketed with the Circuit Court as Case No. 10-9501 on the 2nd day of February 2010. McKenna's Complaint had not been reviewed Chief Judge Batchelder at the time McKenna's Petition was filed with this Court on the 26th day of August 2010.

The requisite *clear and convincing evidence* offered in support of McKenna's Complaint (documentation) *directly* evidences a few of the many instances of Fraud on the Court by the named Attorneys in this case. *Significantly* those instances of misconduct *include* Subornation of Perjury, Subornation of Evidence Tampering *as attested to within Affidavit Statements* offered in support of Nestle's motion for summary judgment, now further referenced and reiterated before this Court within Nestle's Brief in Opposition. Those issues of named Attorneys' Misconduct go right to the heart of the legitimacy of Nestle's representations to this Court, the lower Courts, and resulting judgment(s) *in this case*. Suffice to say, and unsurprisingly, McKenna does *not* stipulate to any of Nestle's representation(s) of alleged version of facts and evidence.

II. ORDER by Chief Judge of the Circuit Court

Pursuant to 6 Cir. R. 46(b)(D) Chief Judge Batchelder has now completed initial review of McKenna's Complaint *and* the documentation offered in support thereof. Significantly, 6 Cir. R. 46(b)(D)(i) *requires* that, if the chief judge determines that the complaint is *without merit* or does not warrant action by the Court, the complaint *shall* be dismissed by order of the chief judge. Upon expressly stated consideration of the documentation offered in support McKenna's Complaint, Chief Judge Batchelder did *not* determine that McKenna's Complaint was without merit, as is evidenced by the fact that Chief Judge Batchelder did *not* dismiss McKenna's Complaint as is required by 6 Cir. R. 46(b)(D)(i).

On the 29th day of September 2010, upon consideration of McKenna's Complaint *and* the documentation offered in support thereof, Chief Judge Batchelder determined that McKenna's Complaint was *sufficiently meritorious* to have issued an ORDER pursuant to 6 Cir. R. 46(b)(D)(iii) that the named Attorneys' misconduct *in this case* be brought before disciplinary board of the Supreme Court of Ohio (Reply Appendix, pp. 1-3).

III. "SUMMARY JUDGMENT"

To Be Clear: This case was decided on summary judgment and has *not* been submitted to a judge or jury for trial, and is well established there *should* not yet have been factual findings.

> "As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs

> substantially from [*Petitioner's*] version. When things are in such a posture, courts are *required* to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam); *Saucier*, supra, at 201, 121 S.Ct. 2151." (*emphasis* added) *Scott v. Harris*, 127 S. Ct. 1769 at 1774-1775 (2007).

a. **As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury.**

Nestle's numerous references to Petitioners' Appendix of Orders and Opinions of the lower courts throughout Respondent's Brief in Opposition citing alleged *findings of fact* by the lower courts, merely highlights the unlawful *pseudo bench-trial* factual findings *at summary judgment* by the lower courts. Furthermore, Chief Judge Batchelder's recent ORDER referring named Attorneys' misrepresentation of facts and evidence *in this case* before disciplinary board of the Supreme Court of Ohio, further emphasizes the lower courts reliance on Nestle's version of facts as woefully misplaced.

b. **Respondent's version of events (unsurprisingly) differs substantially from [*Petitioner's*] version.**

As McKenna has consistently maintained throughout this litigation and accordingly reiterated on page 42 of McKenna's Petition to this Court, and repeats again here and now: "To be Clear: **McKenna only stipulates to the NAMES in this case are**

correct". If deemed material by this Court for purposes of this Petition, a detailed Petitioners version of events is on record with the Circuit of Appeals - Doc: 00615599546 Filed: 06/25/2009 Pages: 11-14; *Id.* Pages: 17-34.

c. **Courts are *required* to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion.".**

i. **Nestle's Recent Argument Regarding Chief Judge Batchelder's ORDER Before the District Court**

In light of that *extremely well-settled* summary judgment standard reiterated by this Court in *Scott v. Harris,* that courts are *required* to draw inferences in light most favorable to McKenna; recent argument proffered by the named Attorneys on the 1st day of October 2010 before the District Court serves as effective concession that Chief Judge Batchelder's ORDER establishes the GRANT, and AFFIRMED summary judgment in favor of Nestle is no longer tenable.

> "Accordingly, the argument that Chief Judge Batchelder determined McKenna's Complaint lacks reasonable grounds *is as easily made* as McKenna's argument that the Chief Judge's referral demonstrates his claims possess merit." (*emphasis* added) (Doc #: 184 Filed: 10/01/10 Page: 2 of 3 at ll. 8-11 PAGEID #: 4566).

At summary judgment, where courts are *required* to view, "... *is as easily made*..." in light

most favorable to McKenna, by Nestle's recent argument before the District Court establishes Chief Judge Batchelder determined McKenna's Complaint has merit. Furthermore, that same argument made by named Attorneys before the District Court unsurprisingly disregards 6 Cir. R. 46(b)(D)(i), requiring the chief judge *shall* dismiss complaints determined to be *without merit*, where in this instance Chief Judge Batchelder did *not* dismiss McKenna's Complaint.

ii. **Reasonable Inferences Drawn From Chief Judge Batchelder's ORDER Most Favorable to McKenna.**

Chief Judge Batchelder's ORDER supports reasonable inference(s) at summary judgment in light most favorable to McKenna, such as but not limited to:

1. Documentation offered in support of McKenna's Complaint meets or exceeds the strict "Clear and Convincing Evidence" burden of proof *required* to sustain a formal complaint of Attorney Misconduct by named Attorneys by perpetrating Fraud on the Court, Subornation of Perjury, and Subornation of Evidence Tampering.
2. McKenna's Complaint of Attorney Misconduct regarding charges of Fraud on the Court, Subornation of Perjury, and Subornation of Evidence Tampering have been determined to have merit.
3. Documentation offered in support of McKenna's Complaint substantially supports named Attorneys' acts warrant *criminal prosecution* for misrepresentation of facts and evidence by

perpetrating Fraud on the Court, Subornation of Perjury, and Subornation of Evidence Tampering in support of Nestle's motion for summary judgment.

4. Legitimately draws the veracity of *all* representations of alleged facts and evidence by the named Attorneys offered in support of Nestle's motion for summary judgment into question.
5. Provides substantial *objective* support for McKenna's consistent and adamantly held position, that *only* the NAMES in this case have been fairly adjudicated. (McKenna Petition at page 42: "To be Clear: **McKenna only stipulates to the NAMES in this case are correct**").
6. Nestle's motion for summary judgment was not *properly* made/supported.
7. Nestle *cannot* support a motion for summary judgment absent misrepresentation of facts and evidence in this case.
8. Post-hoc nature of Chief Judge Batchelder's ORDER *with* reference to prior judgments, expressly copied to the District Court Clerk of Courts "Bonini", supports Chief Judge Batchelder determined the named Attorneys' misconduct in this case is material those referenced judgments, now rendering them as untenable.

It shall indeed be a very perverse system of justice that summary judgment is found properly supported by the District and Circuit Courts, while the named Attorneys' Misconduct in obtaining that same summary judgment face criminal prosecution before a state disciplinary board by ORDER of the Chief Judge of the Circuit Court.

IV. Additional Support for Granting the Petition

a. Petitioner's Question No. 1: Should an employment Civil Rights plaintiff *lawfully* be afforded a "Right to be Heard"?

Chief Judge Batchelder's recent ORDER adds substantial and objective support for McKenna's position that employment Civil Rights are easily undermined by an employer's vexatious litigation practices within both the administrative and judicial processes. This highlights the opportunity to vindicate employment civil rights, and insure employment Civil Rights litigants are afforded fair *opportunity* to be heard. Given the vastly *beyond* "David and Goliath" scale of parties in this case, and the scope of the employers misconduct in a Civil Rights proceeding, this case presents an unparalleled opportunity for this Court to vindicate a Congressional policy of the highest priority, make an example of, and substantially deterring future employer misconduct.

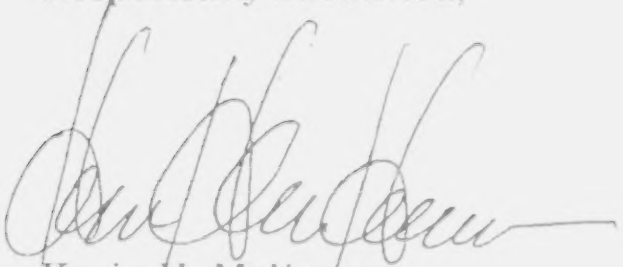
b. Petitioner's Question No. 2: Will the United States Supreme Court *please* grant the *pro se* Petitioner in this case an exercise of this Court's supervisory power?

Remand jurisdiction to the appropriate Court pursuant to final resolution of Chief Judge Batchelder's September 29, 2010 ORDER. Where upon *any* finding of Attorney Misconduct in this case by authority of this Court that default judgment be entered against the Defendant, thereby protecting Petitioner from another round of Respondent's vexatious litigation practices.

CONCLUSION

But for the lower court's *untimely* initiation of remedy for *abusive* litigation practices in this "David and Goliath" employment Civil Rights case, now presents this uniquely situated Court with landmark opportunity to vindicate an important congressional policy by guaranteeing employees across the nation a "Right to be Heard" against discriminatory employment practices.

Respectfully submitted,



Kevin H. McKenna
Petitioner – Pro Se
4885 Adamsville Road
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No. 10-9501
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: COMPLAINT OF MISCONDUCT

This matter involves a complaint alleging misconduct on the part of attorneys Brian E. Dickerson and Jonathan R. Secrest, both of whom are members of the bar of this court, and both of whom were counsel of record for the defendant – Appellee in an appeal brought by the complainant from the judgment of the district court in appeal No. 09-3570, *Kevin H. McKenna v. Nestle Purina Petcare Company*. In that case a panel of the court affirmed the judgment of the district court. Mr. McKenna then filed a petition for rehearing *en banc*; no active judge requested a poll on the suggestion that the matter be reheard by the full court, and the petition for rehearing was therefore referred to and denied by, the panel. A series of post-judgment motions were denied in a subsequent order, thus concluding this court's consideration of the case.

The instant complaint has been referred to the Chief Judge of the court for initial review, pursuant to 6 Cir. R. 46(b)(3)(D). Upon consideration of the complaint and the documentation offered in support thereof, the clerk is hereby directed to refer the matter to the Board of Commissioners on Grievances & Discipline of the Supreme Court of Ohio for such action as it determines to be appropriate; 6 Cir. R. 46(b)(3)(D)(iii).

IT IS SO ORDERED.

(s/ Alice M. Batchelder)
Alice M. Batchelder, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Clerk

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Filed: September 29, 2010

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Re: Case No. 10-9501, *In Re: Brian E. Dickerson and*
Originating Case No. : 10-9501

Dear Sir,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Ken A Loomis

Direct Dial No. 513-564-7067

cc. Mr. James Bonini
Brian E. Dickerson
Jonathan R. Secrest

FILED
SEP 29 2010
LEONARD GREEN, Clerk

No. 10-9501

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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IT IS SO ORDERED.

Alice M. Batchelder, Chief Judge